(14,566.)

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1894.

No. 120.

E. S. EMERT, PLAINTIFF IN ERROR,

vs.

THE STATE OF MISSOURI.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

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a THE UNITED STATES OF AMERICA:

The State of Missouri, Greeting:

You are hereby cited and admonished to be and appear at a Supreme Court of the United States, to be holden at Washington, D. C., on the seventh day of April next, pursuant to a writ of error filed in the clerk's office of the supreme court of the State of Missouri, wherein E. S. Emert is plaintiff in error and you are defendant in error, and wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of such their validity, to show cause, if any there be, why the judgment rendered against the said plaintiff in error, as in said writ of error mentioned, should not be corrected and why speedy justice should not be done to the parties in that behalf.

Witness the Honorable James B. Gantt, presiding judge of division No. 2 of the supreme court of the State of Missouri, this 9th day of March, in the year of our Lord one thousand — hundred and ninety-one.

JAMES B. GANTT,
Presiding Judge.

STATE OF MISSOURI, *ss:*

I hereby acknowledge due service of the within citation this 9th day of March, A. D. 1891.

JOHN M. WOOD,
Attorney for Defendant in Error.

b UNITED STATES OF AMERICA, *ss:*

The President of the United States to the honorable the supreme court of the State of Missouri, Greeting:

Because in the record and proceedings, as also in the rendition of the judgment of a plea which is in the said supreme court, before you, at the October term, 1890, being the highest court of law or equity of the said State in which a decision could be had in the said suit between The State of Missouri, plaintiff, and E. S. Emert, defendant, wherein was drawn in question the validity of a statute of or an authority exercised under said State, on the ground of their being repugnant to the Constitution of the United States, and the decision was in favor of such their validity, a manifest error hath happened, to the great damage of the said E. S. Emert, as by his complaint appears, we, being willing that error, if any hath been, should be duly corrected and full and speedy justice done to the parties aforesaid in this behalf, do command you, if judgment be therein given, that then, under your seal, distinctly and openly, you send the record and proceedings aforesaid, with all things concerning

the same, to the Supreme Court of the United States, together with this writ, so that you have the same at Washington on the seventh day of April next, in the said Supreme Court to be then and there held, that, the record and proceedings aforesaid being inspected, the said Supreme Court may further cause to be done therein to correct that error what of right and according to the laws and customs of the United States should be done.

Witness the Honorable Melville W. Fuller, Chief Justice of the Supreme Court of United States, this ninth day of March, in the year of our Lord one thousand eight hundred and ninety-one.

I issued at office, in Jefferson City, with the seal of the circuit court of the United States for the central division of the western district of Missouri, dated as aforesaid.

{ Seal of the United States Circuit Court of the Western District of Missouri, Central Division. }

H. C. GEISBERG, *Clerk.*

Allowed by—
JAS. B. GANTT,
Presiding Judge, Division No. 2,
Supreme Court of Missouri.

1 STATE OF MISSOURI, *sct:*

Be it remembered that heretofore, to wit, on the 27th day of August, 1890, there was filed in the office of the clerk of the supreme court of the State of Missouri a transcript in the words and figures following, to wit:

2 STATE OF MISSOURI, } *ss:*
County of Montgomery }

Pleas before the circuit court of Montgomery county at a term begun and holden in the town of Danville, county and State aforesaid, on the 28th day of April, 1890, before Honorable E. M. Hughes, judge of the third judicial circuit of the State of Missouri.

April term, 1890.

STATE OF MISSOURI, Plaintiff, }
vs.
E. S. EMERT, Defendant. }

Be it remembered that heretofore, to wit, on the 22nd day of July, 1889, a transcript from the justice of the peace, Walter McQuie, of Upper Loutre township, in said county, was filed in the above-entitled cause, in the office of the clerk of the circuit court in and for the county of Montgomery, in words and figures following, to wit:

Transcript J. P. Filed 22 *July*, 1889.

Copy transcript J. P.

STATE OF MISSOURI, Pl'ff,
vs.
E. S. EMERT, D'f't.

Action for a misdemeanor; before Walter McQuie, justice of the peace.

JULY 15TH, 1889.

Sol. Hughlett, prosecuting attorney for Montgomery county, Mo., filed information against defendant, charging him with selling and peddling sewing machines and other wares and merchandise, and particularly one sewing machine to one Joseph Portucheck, without license, contrary to law, against the peace and dignity of the State.

3 Issued warrant for the apprehension of the defendant to the constable of Upper Loutre township, J. D. Hart, who executed the same forthwith by having the defendant before me in proper person to answer to said charge. He pleads not guilty and, not being ready for a hearing, enters into recognizance in the sum of one hundred dollars, with B. F. Wilson as security, for his appearance before this court on the 23rd day of July, 1889, and this cause is continued to that time.

WALTER McQUIE, *J. P.*

JULY 23RD, 1889.

Cause coming on to be heard, defendant appears in court; and proceeded to hear the evidence for the State and for the defence; from which it is considered and adjudged by the justice that the defendant is guilty in the manner charged in the complaint, and is fined in the sum of fifty dollars and costs.

Now comes defendant and files a proper affidavit for appeal and also appeal bond, J. K. Campbell, B. M. White, and B. F. Wilson as security.

Bond approved and appeal granted. Whereupon the process and all papers filed in the cause, together with a transcript of the docket entries of this court, *is* filed with the clerk of the circuit court of this, Montgomery, county, Missouri.

WALTER McQUIE,
Justice of the Peace.

Certeficate — Justice.

STATE OF MISSOURI, } *ss*:
County of Montgomery, }

I, Walter McQuie, a justice of the peace within and for the township of Upper Loutre, in the county of Montgomery aforesaid,

hereby certify that the above and foregoing is a true and
4 complete transcript of all the entries made in my docket relating to the cause wherein The State of Missouri is plaintiff and E. S. Emert is defendant, and that such transcript is accompanied by the process and all papers filed with the justice in said cause.

Witness my hand this July 24th, 1889.

WALTER McQUIE,
Justice of the Peace.

Indorsed: "Filed July 27th, 1889. A. B. Hunter, clerk."

Copy of Information.

Information for a misdemeanor.

STATE OF MISSOURI, Plaintiff,
against
E. S. EMERT, Defendant.

Before Walter McQuie, justice of the peace, Upper Loutre township, Montgomery county, Missouri.

Sol. Hughlett, prosecuting attorney for and within the county of Montgomery, in the State of Missouri, of his own knowledge informs the court that E. S. Emert, on the 26th day of June, A. D. 1889, at said county of Montgomery, did then and there unlawfully deal in the selling of goods, wares, and merchandise, not being books, charts, maps, or stationery, by going from place to place in a cart or spring wagon with one horse to sell the same, and did then and there, while going from place to place to sell said goods, wares, and merchandise aforesaid, unlawfully sell one sewing machine to David Portucheck without then and there having a license as a peddler or any other legal authority to sell the same, against
5 the peace and dignity of the State.

SOL. HUGHLETT,
County Attorney.

Sol. Hughlett, prosecuting attorney, makes oath and says that the facts stated in the foregoing information are true, according to his best information and belief.

SOL. HUGHLETT.

Subscribed and sworn to before me this 15th day of July, A. D. 1889.

WALTER McQUIE,
Justice of the Peace.

Indorsed: "Filed July 27th, 1889. A. B. Hunter, clerk."

And afterwards, to wit, at the regular October term, A. D. 1889, the following appears of record, to wit:

Opening Order.

October Term, Circuit Court, 1889.

DANVILLE, MISSOURI, MONDAY, *October 28th*, 1889

STATE OF MISSOURI, } ss:
County of Montgomery, }

Be it remembered that on this 28th day of October, A. D. 1889, it being the first day of the regular October term, A. D. 1889, of the circuit court of said county, at the court-house, in the town of Danville, in the county of Montgomery and State of Missouri, appeared Honorable E. M. Hughes, judge of the 3rd judicial circuit of the State of Missouri and judge of the circuit court of said county; whereupon, by order of said judge, court was opened by proclamation made by the sheriff of this county at the court-house door.

Sheriff & Deputies Sworn.

And immediately thereafter comes Randolph E. See, sheriff of Montgomery county, and J. S. McClearey, his deputy, into open court and take the oath prescribed for the sheriff and his
6 deputies in the Revised Statutes for the State of Missouri, at page 467, section 2781, volume one, 1879.

Grand Jury.

Randolph E. See, sheriff of this, Montgomery, county, Missouri, returns into open court his ve-ire with the panel of grand jurors, who, being called, come as follows, to wit: James Hill, Samuel J. Hunter, F. W. Schnieder, Daniel Hart, John C. Davidson, William Dillon, Loyd Nutter, W. Y. Sisk, Charles Reed, A. V. Hayes, W. S. Floyd, and Edward Morrison, twelve good and lawful men of the body of the county of Montgomery and State of Missouri aforesaid, empanneled, sworn, and charged, — retire to their room to consider of their presentments.

Ordered by the court that W. Y. Sisk be appointed foreman.

And afterwards, to wit, at the same term of said court last aforesaid and on the 8th day of November, 1889, the said day being the 11th day of said term of said court, the following appears of record, to wit:

Oct. T. Cont. at General Costs.

STATE OF MISSOURI, Plaintiff, } Appeal. Selling Goods Without License.
vs.
E. S. EMERT, Defendant. }

Now, at this day, comes the prosecuting attorney, who prosecutes for the State of Missouri in this behalf, and also comes the said defendant, in person and with his attorneys, and by consent of both parties hereto this cause is continued at general costs.

And afterwards, to wit, at the regular April term, A. D. 1890, and on Monday, the 28th day of April, 1890, the following, among other, proceedings were had and appear of record, to wit:

DANVILLE, MISSOURI, MONDAY, *April 28th*, 1890.

7 *Opening Order at April T.*, 1890.

STATE OF MISSOURI, } ss:
County of Montgomery, }

Be it remembered that at the regular April term, A. D. 1890, and on Monday, the 28th day of April, A. D. 1890, it being the first day of the regular April term, A. D. 1890, of the circuit court of Montgomery county, Missouri, at the court-house, in the town of Danville, in said county and State, appeared Honorable E. M. Hughes, judge of the third judicial circuit of the State of Missouri and judge of the circuit court of said county.

Whereupon, by order of said judge, court was opened pursuant to the adjournment of December 23rd, A. D. 1889, by proclamation made by the sheriff of this county at the court-house door.

Sheriff & Deputy Sworn.

Randolph E. See, sheriff of Montgomery county, Missouri, and J. S. McClearey, his deputy, come into open court and take the oath prescribed for the sheriff and his deputies, as required by statutes, volume 2, 1889, page 1443, section 6064.

Grand Jury Sworn, &c.

Randolph E. See, sheriff, returns into open court the venire with the panel of grand jurors, who, being called, come as follows, to wit: J. D. Austin, S. G. Wright, Thomas Vandiver, Robert Baker, Henry Hagerdorn, W. V. Sallee, Max Kopp, C. W. Stotler, Frank Gooch, Philip White, T. H. Gillen, and William Cundiff, twelve good and lawful men of the body of the county of Montgomery, who were duly sworn and charged upon their oaths, — retire to their room to consider of their presentments.

Order App'tg Foreman Grand Jury.

Ordered by the court that J. D. Austin be, and he is hereby, appointed foreman.

And afterwards, to wit, at the same term of said court last aforesaid and on the 5th day of May, 1890, it being the seventh (7th) day of said term of said court, the following appears of rec-
8 ord, to wit:

Trial of Cause Before Court Judge & Sentence.

DANVILLE, MISSOURI, MONDAY, *May 7th*, 1890.

STATE OF MISSOURI, Plaintiff, } Appeal. Selling Goods Without License.
E. S. EMERT, Defendant. }

Now, at this day, comes the prosecuting attorney, who prosecutes for the State of Missouri in this behalf, and also comes the said defendant, in person and with his attorneys, and this cause coming on to be heard and being submitted to the court upon an agreed statement of facts, and the court being fully advised thereof, thereupon the court doth find the defendant guilty as charged herein and assesses his punishment at a fine of fifty dollars, and the court in proceeding to pronounce judgment against the defendant sentences said defendant to pay a fine to the county of Montgomery in the sum of fifty dollars for the offense aforesaid.

It is therefore considered, ordered, and adjudged by the court that the plaintiff have and recover of the defendant the said sum of fifty dollars ($50.00), as found and assessed by the court aforesaid, together with her costs of suit in this behalf expended, and that defendant stand committed until said fine and costs are paid, and that execution issue therefor.

STATE OF MISSOURI, } *ss:*
Montgomery County, }

In the Circuit Court, May Term, 1890.

THE STATE OF MISSOURI, Appellee, }
vs.
E. S. EMERT, Appellant. }

For the purpose of dispensing with evidence in the above-
9 entitled cause in the circuit court, it is agreed by and between the parties to said cause that the following are the facts in the case, and *and* that said cause may be decided by the court on the following agreed statement, to wit:

Copy of Agreed Statement.

1st. That for more than five years last past the Singer Manufacturing Company has been and still is a corporation duly organized under the laws of the State of New Jersey and a citizen of that State.

2nd. That on and prior to the 26th day of June, 1889, E. S. Emert, defendant, was in the employ of said Singer Manufacturing Company on a salary for his services, and at said time, in pursuance of said employment, was engaged in going from place to place in said Montgomery county, Missouri, with a horse and wagon, soliciting orders for the sale of Singer sewing machines, having with

him in said wagon a certain new Singer sewing machine, which, on said day, he offered for sale to various persons at different places in said county, and that on said day the defendant did find a purchaser for said machine, and did sell and deliver the same to David Portucheck in said county.

3rd. That said Singer machine in question was manufactured by said "The Singer Manufacturing Company" at its works in the State of New Jersey, and that said sewing machine belonged to and was the property of said company, and that it was forwarded to this State by said company and by it delivered to defendant as its agent for sale on its account, and said machine was sold on account of the said manufacturing company; that said machine was of the value of fifty dollars; that the defendant had no peddler's license at said time.

SOL. HUGHLETT,
County Attorney.
TAYLOR AND POLLARD,
For Defendant.

10 Indorsed: "Filed May 5th, 1890. A. B. Hunter, clerk."

Motion — New Trial Filed.

And on the same day and date of said term of said court last aforesaid the defendant filed his motion for a new trial herein, and which said motion is in words and figures as follows, to wit:

Copy Motion New Trial.

STATE OF MISSOURI }
vs. }
E. S. EMERT. }

Comes now the defendant and moves the court to grant him a new trial for the following reasons, viz:

1st. Because he is charged with no offense known to the law.

2nd. Because the facts stated in the agreed statement constitute no offense.

3rd. Because the statute known as the peddlers' license law, or peddlers and their licenses, being chap. 137 of the Statutes of 1879, is in contravention of the Constitution of the United States of America and is void.

4th. Because said statute is in derogation of the rights of non-residents of this State as granted them by the Constitution of the United States.

5th. Because the statute under which defendant is charged and convicted is in violation of section 8, art. I, of the Constitution of the United States and void in so far as it applies to the defendant herein.

6th. Because as upon the case as made the finding and judgments should have been for the defendant.

TAYLOR AND POLLARD,
For Defendant.

11 Indorsed: "Filed May 5th, 1890. A. B. Hunter, clerk."

And on the same day and date last aforesaid the following appears of record, to wit:

Order of Court Overruling Motion for New Trial.

DANVILLE, MISSOURI, MONDAY, *May 5th*, 1890.

STATE OF MISSOURI, Plaintiff, *vs.* E. S. EMERT, Defendant. } On Defendant's Motion for a New Trial.

Now, at this day, comes the prosecuting attorney, who prosecutes for the State of Missouri in this behalf, and also comes the said defendant, by his attorneys, and files his motion for a new trial herein, and said motion coming on to be heard and the matters and things contained in said motion being submitted to the court, and being seen, heard, and fully understood by the court, it is considered and ordered by the court that said motion be, and the same is hereby, overruled.

Motion in Arrest Filed.

And on the same day and date last aforesaid the following motion in arrest of judgment was filed in said cause, and which is in words and figures as follows, to wit:

Copy Motion in Arrest.

STATE OF MISSOURI *vs.* E. S. EMERT.

Come now the defendant and moves the court to arrest the judgment herein, because the information on which this prosecution is based fails to state facts sufficient to constitute any offense.

TAYLOR AND POLLARD,
For Defendant.

12 Indorsed: "Filed May 5th, 1890. A. B. Hunter, clerk."

And on the same day and date last aforesaid the following appears of record, to wit:

Order Overruling Def't's Motion in Arrest.

DANVILLE, MISSOURI, MONDAY, *May 5th*, 1890.

STATE OF MISSOURI, Plaintiff, *vs.* E. S. EMERT, Defendant. } On Defendant's Motion in Arrest of Judgment.

Now, at this day, comes the prosecuting attorney, who prosecutes for the State of Missouri in this behalf, and also comes the said de-

fendant, by his attorneys, and files his motion in arrest of judgment herein, and said motion coming on to be heard, and all and singular the matters and things in said motion contained being submitted to the court, and being seen, heard, and fully understood by the court, it is considered and ordered by the court that said motion be, and the same is hereby, overruled.

And afterwards, to wit, at the same term of said court last aforesaid and on the same day and date last aforesaid, the following appears of record, to wit:

Leave to File Bill of Exceptions.

DANVILLE, MISSOURI, MONDAY, *May 5th*, 1890.

STATE OF MISSOURI, Plaintiff,
vs.
E. S. EMERT, Defendant.

Now, at this day, comes the prosecuting attorney, who prosecutes for the State of Missouri in this behalf, and also comes the said defendant, by his attorneys, and leave is by the court granted defendant to file his bill of exceptions in this cause within 30 days from this date.

And afterwards, to wit, at the same term of said court last aforesaid, the following appears of record, to wit:

13 *Affidavit — Appeal Filed.*

DANVILLE, MISSOURI, WEDNESDAY, *May 7th*, 1890.

STATE OF MISSOURI, Plaintiff,
vs.
E. S. EMERT, Defendant.

Now, at this day, comes the defendant in the above-entitled cause, by his attorneys, and files his affidavit for an appeal from the decision and judgment of this court to the supreme court of the State of Missouri; also bond *in* appeal filed.

And which said affidavit is in words and figures as follows, to wit:

Copy of Affidavit.

STATE OF MISSOURI, *City of St. Louis,* } *ss:*

Circuit Court, Montgomery County, May Term, 1890.

STATE OF MISSOURI, Appellee,
vs.
E. S. EMERT, Appellant.

And now comes S. N. Taylor, agent for the defendant in the above-entitled cause, who, being first duly sworn, upon his oath

says that the appeal in the above-entitled cause is not made for vexation or delay, but because said affiant and said appellant believes that the appellant is aggrieved by the judgment or decision of the circuit court of Montgomery county, and that said appeal involves the question of the constitutionality of the law under which said appellant was convicted, said appellant claiming that said law, by virtue of the Constitution of the United States, is void as applied to the facts upon which he was found guilty.

SENECA N. TAYLOR.

Subscribed and sworn to before me this 6th day of May, 1890.

GEORGE M. BLOCK,
[SEAL.] *Notary Public.*

Term expires June 28th, 1893.

14 Indorsed: "Filed May 7th, 1890. A. B. D. A. B. Hunter, clerk."

Copy — Appellant's Bond.

(Appellant's bond.)

Know all men by these presents that we, E. S. Emert, as principal, and Seneca N. Taylor, as security, are held and firmly bound unto the State of Missouri in the sum of one hundred and fifty dollars, lawful money of the United States; for the payment whereof, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, firmly by these presents.

The condition of this recognizance is such that whereas the circuit court of the county of Montgomery and State of Missouri, in the case of The State of Missouri *vs.* E. S. Emert, has allowed the defendant an appeal from its judgment to the supreme court of Missouri:

Now, if the above-bounded E. S. Emert shall appear in the said circuit court of Montgomery county, at such time and place as the supreme court aforesaid shall direct, and shall render himself in execution and obey every order and judgment which shall be made or rendered in the premises, then this recognizance shall be void; otherwise to remain in full force, virtue, and effect.

In testimony whereof we have hereto set our hands and seals this sixth day of May, in the year of our Lord eighteen hundred and ninety.

E. S. EMERT, [SEAL.]
By H. M. POLLARD.
SENECA N. TAYLOR. [SEAL.]

Approved by the court.
A. B. HUNTER, *Clerk.*

15 *Bond Approved.*

STATE OF MISSOURI, } ss:
County of St. Louis, }

Seneca N. Taylor, being duly sworn, upon his oath states that he is the owner, in his own name and in his own right, of real estate in the city of St. Louis worth more than five thousand dollars over and above all his exemptions and liabilities and subject to execution.

SENECA N. TAYLOR.

Subscribed and sworn to before me this May 6th, 1890.

GEORGE M. BLOCK,
[SEAL.] *Notary Public.*

Term expires June 28, '93.

Indorsed: "Filed May 7th, 1890. A. B. Hunter, clerk."

April Adjourned Term.

And afterwards, to wit, at the regular April term, 1890, and at the adjourned term of said court last aforesaid, and on the 29th day of May, 1890, the following appears of record, to wit:

April Adjourned Term, 1890.

DANVILLE, MISSOURI, THURSDAY, *May 29th*, 1890.

STATE OF MISSOURI, Plaintiff, }
vs.
E. S. EMERT, Defendant. }

Order Allowing Appeal.

Now, at this day, comes the prosecuting attorney, who prosecutes for the State of Missouri in this behalf, and also comes the defendant, in person and by his attorneys, and files his affidavit for an appeal from the judgment and decision of this court to the supreme court of the State of Missouri, and also files his bond in appeal in the penal sum of one hundred and fifty dollars ($150.00), with E. S. Emert as principal and Seneca N. Taylor as security; whereupon it is ordered by the court that said bond be, and the same is hereby, approved.

16 And said affidavit for an appeal being further considered, it is ordered by the court that the defendant herein be allowed an appeal, and that the clerk of this court make out a full, true, and complete transcript of all the record and proceedings had in said cause and transmit the same, all duly and properly certified, to the clerk of the supreme court of the State of Missouri, at the city of Jefferson, in the State of Missouri.

And afterwards, to wit, on the same day — date last aforesaid, the following appears of record, to wit:

Bill of Exceptions Filed.

April Adjourned Term, 1890.

DANVILLE, MISSOURI, THURSDAY, *May 29th*, 1890.

STATE OF MISSOURI, Plaintiff,
vs.
E. S. EMERT, Defendant.

Now comes the defendant, by attorneys, and files his bill of exceptions, which is duly signed and sealed and made a part of this *this* record in this cause.

And which said bill of exceptions is in words and figures as follows, to wit:

Copy — Bill Exceptions.

In the Circuit Court in and for Montgomery County, State of Missouri, May Term, 1890.

STATE OF MISSOURI, Appellee,
vs.
E. S. EMERT, Appellant.

Be it remembered that on the 5th day of May, 1890, the above-entitled cause came on for trial before said court, without a jury, the defendant having appeared and entered a plea of not guilty and having expressly waived a jury and consented that his cause should be tried by the court upon an agreed statement, in words and figures as follows, to wit:

17 *Agreed Statement.*

STATE OF MISSOURI, } *ss:*
Montgomery County, }

In the Circuit Court, May Term, 1890.

THE STATE OF MISSOURI, Appellee,
vs.
E. S. EMERT, Appellant.

For the purpose of dispensing with evidence in the above-entitled cause in said circuit court, it is agreed by and between the parties to said cause that the following are the facts in the case, and that said cause may be decided by the court on the following agreed statement, to wit:

1st. That for more than five years last past the Singer Manufacturing Company has been and still is a corporation duly organized under the laws of the State of New Jersey and a citizen of that State.

2nd. That on and prior to the 26th day of June, 1889, E. S. Emert,

defendant, was in the employ of said The Singer Manufacturing Company on a salary for his services, and at said time, in pursuance — said employment, was engaged in going from place to place in said Montgomery county, Missouri, with a horse and wagon soliciting orders for the sale of Singer sewing machines, having with him in said wagon a certain new Singer sewing machine, which on said day he offered for sale to various persons at different places in said county, and that on said day the defendant did find a purchaser for said machine and did sell and deliver the same to David Portucheck in said county.

3rd. That said Singer machine in question was manufactured by said "The Singer Manufacturing Company at its works in the State of New Jersey," and that said machine belonged to and was the property of said company, and that said machine was forwarded by said company to this State and by it delivered to the defend-
18 ant as its agent for sale on its account, and said machine was so sold on account of said manufacturing company; that said machine was of the value of fifty dollars, and the defendant at the time of said sale had no peddler's license.

The court, having heard said agreed statement read and the case having been submitted by counsel, did, on the said 5th day of May, 1890, find the defendant guilty and did assess his fine at the sum of fifty dollars, and ordered judgment accordingly.

That thereupon said defendant, immediately after said finding and judgment by said court, and on the same day and at the same term, filed the following motions for new trial and in arrest of judgment, to wit:

(*Motion — New Trial.*)

STATE OF MISSOURI }
vs.
E. S. EMERT. }

Comes now the defendant and moves the court to grant him a new trial for the following reasons, viz:

1st. Because he is charged with no offense known to the law.

2nd. Because the facts stated in the agreed statement constitute no offense.

3rd. Because the statute known as the peddlers' license law or peddlers and their licenses, being chap. 137 of the Statutes of 1879, is in contravention of the Constitution of the United States of America and is void.

4th. Because said statute is in derogation of the rights of non-residents of this State as granted them by the Constitution of the United States.

5th. Because the statute under which defendant is charged and convicted is in violation of sec. 8, art. I, of the Constitution of the United States and void in so far as it applies to the defendant herein.

19 6th. Because upon the case as made the finding and judgment should have been for the defendant.

TAYLOR AND POLLARD,
For Defendant.

Indorsed: "Filed May 5th, 1890. A. B. Hunter, clerk."

Mot. in Arrest.

(Motion in arrest of judgment.)

STATE OF MISSOURI
vs.
E. S. EMERT.

Comes now the defendant and moves the court to arrest the judgment herein, because the information on which this prosecution is based fails to state facts sufficient to constitute any offense.

TAYLOR AND POLLARD,
For Defendant.

Indorsed: "Filed May 5th, 1890. A. B. Hunter, clerk."

And thereafter and on the same day, to wit, May 5th, 1890, said motion for new trial and said motion in arrest of judgment were duly submitted to the court, and, being duly considered by the court, were both overruled; and said defendant, by his counsel, then and there duly excepted to the action of said court in overruling said motion for a new trial and in overruling said motion in arrest of judgment, and still except- to said action of the court in that behalf.

And forasmuch as the defendant insists that said judgment on the agreed statement is erroneous, he now submits this his
20 bill of exceptions and prays the court to allow, sign, and seal the same, that it may become a part of the record in said cause, and said court does now sign and seal the same for said purpose.

Signed, Sealed, &c.

Given under my hand and seal this 29th day of May, A. D. 1890.

E. M. HUGHES, *Judge.* [SEAL.]

Indorsed: "Filed May 29th, 1890. A. B. Hunter, clerk."

Clerk's Certificate.

STATE OF MISSOURI, } ss:
County of Montgomery, }

I, A. B. Hunter, clerk of the circuit court within and for the county of Montgomery, in the State of Missouri, hereby certify that the above and foregoing is a full, true, and complete transcript of

the record and proceedings had in said cause as the same appears of record or on file in my office.

In witness whereof I have hereunto set my hand and affixed the seal of said court. Done at office, in the town of [SEAL.] Danville, county and State aforesaid, this 17th day of July, A. D. 1890.

A. B. HUNTER,
Clerk of the Circuit Court, Montgomery County, Mo.

21 In the Supreme Court of the State of Missouri, October Term, 1890.

Be it remembered that heretofore, to wit, on the 14th day of October, 1890, the following further proceedings were had in said cause, to wit:

* * * * * * *

STATE OF MO., Resp.,
v.
E. S. EMERT, App.

Come now the said appellants, by attorneys, and file *their* motions to advance these causes on the docket.

Which said motion is in the words and figures following:

In the Supreme Court.

STATE OF MISSOURI
vs.
E. S. EMERT.

Comes now the defendant and shows to the court that he has appealed from the judgment of the circuit court of Montgomery county, wherein he was convicted of peddling without a license.

That the facts in the case were agreed upon and were as follows:

For the purpose of dispensing with evidence in the above-entitled cause in the circuit court, it is agreed by and between the parties to said cause that the following are the facts in said case, and that said cause may be decided by the court on the following agreed statement, to wit:

1st. That for more than five years last past the Singer Manufacturing Company has been and still is a corporation, duly organized under the laws of the State of New Jersey and a citizen of that State.

2nd. That on and prior to the 26th day of June, 1889, E. S. Emert, defendant, was in the employ of said Singer Manu-
22 facturing Company on a salary for his services and at said time, in pursuance of said employment, was engaged in going from place to place in said Montgomery county, Missouri, with a horse and wagon soliciting orders for the sale of Singer sewing machines, having with him in said wagon a certain New Singer sewing machine, which on said day he offered for sale to various

persons at different places in said county, and on said day the defendant did find a purchaser for said machine and did sell and deliver the same to David Portucheck in said county.

3rd. That said Singer machine in question was manufactured by said "Singer Manufacturing Company" at its works in the State of New Jersey, and that said sewing machine belonged to and was the property of said company, and that it was forwarded to this State by said company and by it delivered to defendant as its agent for sale on its account, and said machine was sold on account of the said manufacturing company; that said machine was of the value of fifty dollars; that the defendant had no peddler's license at said time.

SOL. HUGHLETT,
County Attorney.
TAYLOR & POLLARD,
For Defendant.

That the question involved in this case is the constitutionality of the peddlers' license law, which very materially affects the revenues of the State.

Your petitioner further shows that the attorney general and the prosecuting attorney of Montgomery county have been notified of the making of this application.

23 Wherefore defendant prays that this case may be advanced on the docket and set down for an early hearing.

TAYLOR & POLLARD,
Attorneys for Defendant.

STATE OF MISSOURI, Plaintiff,
vs.
E. S. EMERT, Defendant. } Pending in the Supreme Court.

The attorney general of the State of Missouri and Sol. Hughlett, Esq., prosecuting attorney of Montgomery county:

Please take notice that on the first day of the next term of the supreme court of the State of Missouri the defendant will petition the said court to advance the above-entitled cause on the docket.

TAYLOR & POLLARD,
Attorneys for Defendant.

Received a copy of the above notice this 27th day of September, 1890, and I assent to the advancement of said cause on the docket of said court.

SOL. HUGHLETT,
Pros. Att'y for Montgomery County.

STATE OF MISSOURI, Plaintiff,
vs.
E. S. EMERT, Defendant. } Pending in the Supreme Court.

The attorney general of the State of Missouri and Sol. Hughlett, prosecuting attorney of Montgomery county:

Please take notice that on the first day of the next term
24 of the supreme court of the State of Missouri the defendant will petition the said court to advance the above-entitled cause on the docket.

TAYLOR & POLLARD,
Attorneys for Defendant.

Received a copy of the above notice this 29 day of September, 1890.

J. M. WOOD,
Att'y Gen'l.

Be it remembered that heretofore, to wit, on the 17th day of November, 1890, the following further proceedings were had in said cause, to wit:

* * * * * * *

STATE OF MO., Resp.,
v.
E. S. EMERT, App.

* * * * * * *

Now, at this day, the court, having fully considered and understood the motions heretofore filed to advance these causes on the docket, doth order that said motions be, and the same are hereby, sustained and these causes set for hearing on the 3rd day of the January call of the docket.

25 Be it remembered that heretofore, to wit, on the 31st day of December, 1890, the following further proceedings were had in said cause, to wit:

STATE OF MISSOURI, Respondent,
vs.
E. S. EMERT, Appellant.

Comes now the said appellant, by attorney, and files his assignment of errors herein, which is in words and figures as fol-ows, to wit:

Assignment of Errors.

First. The court erred in holding appellant guilty upon the agreed statement.

Second. The court erred in not holding the law under which appellant was prosecuted, as applied to the agreed statement, to be in conflict with the Constitution of the United States and therefore void:

1st. Because the license in question is an impost on imports, and therefore violates art. 1, sec. 10, of the Constitution, which provides that "no State shall, without the consent of Congress, lay any imposts or duties on imports or exports except what may be absolutely necessary for executing its inspection laws."

2d. Because the license is a tax and is an interference with interstate commerce, and therefore violates art. 1, sec. 8, which provides that Congress shall have power "to regulate commerce * * * among the several States."

Be it remembered that heretofore, to wit, on the 4th day of November, 1890, there was submitted to the qualified voters of the State of Missouri an amendment to the constitution thereof increasing the number of the judges of the supreme court from five
26 to seven after the 1st of January, 1891, which said court shall be divided into two divisions, each division to have concurrent jurisdiction of all matters and causes in said court, except that division number two shall have exclusive cognizance of all criminal cases pending in said court; which said amendment was declared adopted, and under the provisions thereof the governor of the State of Missouri appointed Honorable George B. Macfarlane and Honorable John L. Thomas as judges of the supreme court, and, with Honorable James B. Gantt, who was elected at the general election in the year 1890, constitute division number two of the said supreme court.

In the Supreme Court of the State of Missouri, Division No. 2, October Term, 1890.

Be it remembered that heretofore, to wit, on the 5th day of January, 1891, the following order was made in this court, to wit:

Ordered that it is the sense of the present judges of division No. 2 of this court that the judge oldest in commission for the time being shall be presiding judge; and in accordance therewith Honorable James B. Gantt be, and hereby is, elected presiding judge of division No. 2 of the supreme court of Missouri.

And afterwards, to wit, on the 7th day of January, 1891, the following further proceedings were had in said cause, to wit:

STATE OF MO., Resp., }
v. } 5548.
E. S. EMERT, App. }

* * * * * * *

Come now the said parties, by attorneys, and submit these causes to the court on briefs.

27 And afterwards, to wit, on the 27th day of January, 1891, the following further proceedings were had in said cause, to wit:

STATE OF MISSOURI, Respondent, } 5548. Appeal from Montgomery
vs. } County Circuit Court.
E. S. EMERT, Appellant. }

Now, at this day, come again the parties aforesaid, by their respective attorneys, and the court here, being now sufficiently advised of and concerning the premises, do consider and adjudge that the judgment aforesaid, in form aforesaid, by the said Montgomery county circuit court rendered, be in all things affirmed and stand in full force and effect; and it is further considered and adjudged by the court that the said respondent recover against the said appellant its costs and charges herein expended and have therefor execution. (Opinion filed.)

Which said opinion is in words and figures as follows, to wit:

In the Supreme Court of Missouri, October Term, 1890, Division No. 2.

STATE OF MISSOURI }
v. }
E. S. EMERT. }

Plaintiff was prosecuted upon information before a justice of the peace for following the business of a peddler without having license therefor. The case was appealed to the circuit court of Montgomery county, where it was tried, defendant found guilty, and a fine of fifty dollars imposed upon him. From the judgment he has appealed to this court, on the ground that a constitutional question is involved.

28 The case was submitted to the court upon the following agreed statement of facts:

"For the purpose of dispensing with evidence in the above-entitled cause in the circuit court, it is agreed by and between the parties to said cause that the following are the facts in said case, and that said cause may be decided by the court on the following agreed statement, to wit:

1st. That for more than five years last past the Singer Manufacturing Company has been and still is a corporation duly organized under the laws of the State of New Jersey and a citizen of that State.

2d. That on and prior to the 26th day of June, 1889, E. S. Emert, defendant, was in the employ of said Singer Manufacturing Company on a salary for his services, and at said time, in pursuance of said employment, was engaged in going from place to place in said Montgomery county, Missouri, with a horse and wagon, soliciting orders for the sale of Singer sewing machines, having with him in said wagon a certain New Singer sewing machine, which on said day he offered for sale to various persons at different places in said county, and on said day the defendant did find a purchaser for said machine, and did sell and deliver the same to David Portuchek in said county.

3d. That said Singer machine in question was manufactured by

said 'Singer Manufacturing Company' at its works in the State of New Jersey, and that said machine belonged to and was the property of said company, and that it was forwarded to this State by said company and delivered to defendant as its agent for sale on its account, and said machine was sold on account of the said manufacturing company; that said machine was of the value of fifty dollars, and the defendant at the time of said sale had no peddler's license."

The statute under which defendant was convicted is as follows:

"SEC. 7211. Whoever shall deal in the selling of patents, patent rights, patent or other medicines, lightening rods, goods, wares, or merchandise, except books, charts, maps, and stationery, by going from place to place to sell the same, is declared to be a peddler."

SEC. 7212. No person shall deal as a peddler without a license and no two or more persons shall deal under the same license, either as partners, agents, or otherwise, and no peddler shall sell wines or spirituous liquors.

SEC. 7217. This section fixes the license fee to be paid for peddling with horse and buggy at twenty-five dollars for six months for the use of the State.

Sec. 7219 fixes a penalty of fifty dollars for dealing as a peddler with horse and wagon without license.

Defendant insists that this statute as applied to him, under the statement of facts agreed to, is obnoxious to that provision of the Federal Constitution (sec. 1, art. 8) which delegates to Congress the sole pawer to regulate commerce among the States.

This subject has of late years received much discussion and consideration from the courts of the country, both State and Federal, and many of the questions involved have been fairly established. It is conceded by all that a law of a State which imposes a tax upon articles manufactured in or imported from another State, as a condition of the right to sell and dispose of them, would be in violation of this provision of the Constitution. The difficulty in each case has been to determine the effect of the particular law under consideration; to determine whether, in that case, the commercial power of the Federal Government had ceased and the power of the State had commenced. Solving these questions as they arose, it has been settled that it matters not whether the tax is imposed directly upon the commodity sold or by way of license exacted of the persons who make the sales; the restriction on commerce would be the same in either case. Welton *v.* State, 91 U. S., 275; Robbens *v.* Shelby Taxing District, 120 U. S., 489.

By force of these decisions of the court having the highest judicial authority over the subject, it is settled that the sale of goods which are in another State at the time of the sale for the purpose of introducing them into the State in which the regulation is made is interstate commerce; that a tax on a sale of such goods before they are brought into the State is a tax on interstate commerce itself; that the imposition of a license tax upon the person making such sale is in its effect a tax upon the goods themselves; that a State cannot tax goods beyond its jurisdiction. Hynes *v.* Briggs, 41 Fed. Rep.,

469, citing Robbins *v.* Taxing Dist., 120 U. S., 489; Brown *v.* Houston, 114 U. S., 622; Woodruff *v.* Parkhorn, 8 Wall., 123; Cook *v.* Renn, 97 U. S., 566; Weton *v.* Missouri, 91 U. S., 275.

It has been equally well settled that as soon as goods are brought into a State and have become a part of its general mass of property *it* becomes taxable in the same manner as other similar property in the State. Brown *v.* Maryland, 12 Wheat., 419; Brown *v.* Houston, 114 U. S., 622; Machine Co. *v.* Gage, 100 U. S., 676. The question of most difficulty is to determine, in individual cases, whether the property brought into one State from another has become a
31 part of the general mass of the property of such State. The only rule yet laid down is that as long *so* it remains in the original package in which it was brought into the State it is beyond the control of State laws attempting to restrict or prohibit its sale. Leisy *v.* Hardier, 135 U. S., 100. The rule is more elaborately stated by Chief Justice Marshall in Brown *v.* State of Maryland, *supra*, who, after suggesting the difficulties that might arise in distinguishing between what would be laying a duty on imports and what would be the acknowledged power of States to tax persons and property within their territory, says: "Yet the distinction exists and must be marked as the cases arise. Till they do rise it might be premature to state any rule as being universal in its application. It is sufficient for the present to say generally that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property of the country it has, perhaps, lost is distinctive character as an import and has become subject to the taxing power of the State; but while remaining the property of the importer, in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition of the Constitution." The right of the State to require a license tax on certain avocations, and among them that of a peddler, is not questioned in this case, and has been recognized by the Supreme Court of the United States in many of the cases bearing on this question. Machine Co. *v.* Gage, 100 U. S., 676. Whoever shall deal in selling goods, wares, and merchandise by going from place to place to sell the same is declared to be a peddler by the statute. Sec. 7211.

Applying these principles to the facts in this case, what is
32 the logical conclusion? Defendant was engaged in going from place to place selling and trying to sell sewing machines in Montgomery county, in this State, and had been so engaged for some years. He carried the machines with him in a wagon, and on making a sale delivered those sold to the purchaser. He was not only soliciting orders, but was making sales and delivering the property sold. These acts bring him clearly within the statutory definition of a peddler, and, having no license from the State, he became liable to the penalties imposed by the statute unless for any reason he was exempt from the operations of the law. This exemption is claimed on the ground that he was selling the machines as agent for the Singer Manufacturing Company, a corporation under the laws of the State of New Jersey and a citizen of that State.

It will be observed that the statute now makes no discrimination between the sale of the products of this and any other State, as was the case in Weldon *v.* State, 91 U. S., *supra*, and when defendant was engaged in selling these machines the commercial power of the Federal Government did not extend over them on account of any discriminating legislation of the State by reason of their foreign character. The only question, then, is whether this property, in the sale of which defendant was engaged, had lost its distinctive character as an import and become subject to the taxing power of the State, or whether it continued under the protecting power of the Federal Government until sold and transferred.

The difficulty, suggested by Chief Justice Marshall, of drawing the line of distinction between the restriction upon the power of the State imposed by the Constitution and the acknowledged power of the State to tax persons and property meets us here. After
33 careful consideration of the decided cases and the principle involved we have come to the conclusion that as soon as the defendant, as agent for the foreign manufacturer, undertook to sell a machine in the manner and by the means adopted by him, it came within the taxing power of the State, and a sale thereof without a license made him amenable to the penalties of the law. The justice of this conclusion is manifest. The law places no restrictions or barriers on the commerce of citizens of other States. It imposes no burdens that are not borne equally by citizens of this State. The burdens of taxation are imposed and endured as a recompense for the protection the law affords to person and property, and that protection is thrown around all alike, the resident citizen and the citizen of other States. The non-resident manufacturer and merchant voluntarily places his property under the protection of the laws of this State. Can it be unjust to require of him the same tribute that is required of his resident competitor in business? The framers of the Constitution could never have intended to discriminate against any State or the citizens thereof. Indeed, it is universally conceded and contended that this commerce clause of the Constitution was designed to prevent discriminations and to encourage and foster free and unrestricted trade among the several States. All that can reasonably be required is to accord to the non-residents rights equal to, but not above, those of the citizen; that with respect to commerce State lines be obliterated and the citizens of the Union stand upon the same footing and have equal opportunities in their contests for trade and business.

We think the conclusion reached entirely consistent with
34 the decisions of the Supreme Court of the United States and directly borne out by some of them. The case of Machine Co. *v.* Gage, 100 U. S., 676, we consider directly in point. The code of Tennessee provided that all peddlers of sewing machines and selling by sample should pay a tax of ten dollars. The agent of the Home Machine Company, a corporation of Connecticut, was required to take out license before he was permitted to peddle machines. The company sued to recover back the license fee on the

ground that the law was not valid as applied to one engaged in sale of goods manufactured in another State. Plaintiff was defeated in the highest State court, and the judgment was affirmed on appeal to the United States Supreme Court. See also Waring *v.* The Mayor, 8 Wall., 110; Woodruff *v.* Parkhorn, 8 Wall., 123. In the dissenting opinion of Waite, C. J., in case of Robbing *v.* Taxing District, 120 U. S., 501, he says: "I am unable to see any difference in principle between a tax on a seller by sample and a tax on a peddler; and yet I can hardly believe it would be contended that the provision of the same statute, now in question, which fixes a license fee for all peddlers in the district would be held to be unconstitutional in its application to peddlers who came with their goods from another State and expected to go back again." United States Circuit Judge Caldwell, of this circuit, takes the same position in a case recently decided by him, in which he holds that a foreign corporation selling ranges which have been previously shipped into the State and there stored cannot avoid the payment of the license required of stove-range agents under the laws of Arkansas on the ground that he is engaged in interstate commerce. The effect of the decision in that case was that as soon as the ranges were stored for sale they became subject to the taxing
35 power of the State. Hines *v.* Briggs *et al.*, 41 Fed. Rep., 468. See also *Ex parte* Butin, 28 Tex. App., 304; State *v.* Richards, 32 W. Va., 348.

That the Constitution only requires and was only intended to enforce free interchange of commodities between citizens of different States, without regard to State lines, and that citizens of one State should have the right to sell their products in any other State without prejudice or discrimination, we think clearly declared in Woodruff *v.* Parkhorn, 8 Wall., 130; Hinson *v.* Lott, *id.*, 150; Paul *v.* Virginia, *id.*, 168, and many other cases. In Hinson *v.* Lott, Mr. Justice Miller, for the court, in conclusion says: "As the effect of the act is such as we have described and it institutes no legislation which discriminates against the products of sister States, but merely subjects them to the same rate of taxation which similar articles pay that are manufactured in the State, we do not see in it an attempt to regulate commerce, but an appropriate and legitimate exercise of the taxing power of the State."

The supreme court of Pennsylvania, in a recent case (Commonwealth *v.* Gardner, 19 Atlantic Rep., 550) similar to the case at bar in nearly every material fact, held that a State law requiring a license of a peddler, though engaged in the sale of goods manufactured and owned by a citizen of another State, was not in contravention of the constitutional provision in respect to commerce among the States, but was simply a police regulation and under the exclusive control of the State so long as it made no discrimination against citizens of other States. The argument used is very plausible and would merit careful consideration did we not put our decision on other grounds which we believe founded upon the best of reasons, supported by the highest authority, and in perfect accord with the spirit and intent of the Constitution.

36 Holding then, as we do, that defendant was not exempt from the operation of the laws of the State regulating the license of peddlers by reason of the goods sold being the property of a resident of another State, the judgment is affirmed. All concur.

G. B. MACFARLANE.

And afterwards, to wit, on the 10th day of March, 1891, the following further proceedings were had in said cause, to wit:

STATE OF MISSOURI, Respondent,
vs.
E. S. EMERT, Appellant.

Now, at this day, there is presented to the Honorable James B. Gantt, presiding judge of division No. 2 of the supreme court of the State of Missouri, at chambers, a writ of error to reverse the judgment in the above cause, a citation directed to the said respondent, citing and admonishing it to be and appear at a Supreme Court of the United States on the seventh day of April next, a supersedeas bond in the sum of five hundred dollars; which said writ of error is allowed, said citation signed, and bond approved and ordered to be filed and made a part of the record herein.

Which said bond is in words and figures as follows, to wit:

Know all men by these presents that we, E. S. Emert, as principal, and J. S. Finkenbiner and Seneca N. Taylor, as sureties, are held and firmly bound unto the State of Missouri in the full and just sum of five hundred dollars, to be paid to the said State of Missouri; to which payment, well and truly to be made, we bind ourselves, our heirs, executors, and administrators, jointly and severally, by these presents.

37 Sealed with our seals and dated this 26th day of March, in the year of our Lord one thousand eight hundred and ninety-one.

Whereas lately, at the October term, A. D. 1890, of the supreme court of the State of Missouri, in a suit depending in said court between said State of Missouri, plaintiff, and E. S. Emert, defendant, judgment was rendered against the said E. S. Emert; and the said E. S. Emert having obtained a writ of error of the said court to reverse the judgment in the aforesaid suit, and a citation directed to the said State of Missouri, citing and admonishing it to be and appear at a Supreme Court of the United States to be held at Washington, D. C., on the seventh day of April next:

Now, the condition of the above obligation is such that if the said E. S. Emert shall prosecute said writ to effect and answer all

damages and costs if he fail to make good his plea, then the above obligation to be void; else to remain in full force and virtue.

E. S. EMERT, [SEAL.]
By S. N. TAYLOR.
SENECA N. TAYLOR. [SEAL.]
J. S. FINKENBINER. [SEAL.]

Sealed and delivered in presence of—
JAMES P. COSTELLO.
FRANK PIERCE.

Approved by—
JAMES B. GANTT,
Presiding Judge.

38 UNITED STATES OF AMERICA, } *sct:*
East. Div., Eastern District of Missouri, }

Before me, clerk of the United States circuit court, eastern division, eastern judicial district of Mo., personally appeared J. S. Finkenbiner, to me well known, who upon oath state that he is worth over and above his indebtedness the sum of three thousand dollars, and that he owns real property to that amount subject to execution in the city of St. Louis.

J. S. FINKENBINER.

Subscribed and sworn to before me this 26 day of March, 1891.

A. P. SELBY,
Clerk of the United States Circuit Court, Eastern
[SEAL.] *Division, Eastern Judicial District of Mo.,*
By T. L. CRAWFORD, *Deputy.*

UNITED STATES OF AMERICA, } *sct:*
East. Div., Eastern District of Missiouri, }

Before me, clerk of the United States circuit court, eastern division, eastern judicial district of Mo., personally appeared Seneca N. Taylor, to me well known, who upon oath states that he is worth over and above all indebtedness the sum of fifteen thousand dollars, and that he owns real property to that amount subject to execution in the city of St. Louis, Missouri.

SENECA N. TAYLOR.

Subscribed and sworn to before me this 26th day of March, 1891.

[SEAL.] A. P. SELBY,
Clerk of the United States Circuit Court, Eastern
Division, Eastern Judicial District of Mo.,
By T. L. CRAWFORD, *Deputy.*

39 UNITED STATES OF AMERICA, } *sct:*
Western District of Missouri, }

I do hereby certify that the parties subscribing the within bond are respectively over the age of twenty-one years and are compe-

tent to contract, and that their signatures to said bond are genuine. I further certify that said bond is good and sufficient.

Witness my hand and seal this 26th day of March, 1891.

A. P. SELBY,

[SEAL.] *Clerk of the United States Circuit Court, Eastern Division, Eastern Judicial District of Mo.*

Endorsed: "Filed March 27, 1891. Henry W. Ewing, clerk, by Rowan Ray, D. C."

40 STATE OF MISSOURI, *sct:*

I, Henry W. Ewing, clerk of the supreme court of the State of Missouri, do hereby certify the foregoing to be a true, full, and complete transcript of the record and proceedings in the above-entitled cause as fully as the same remain on file and of record in my office.

Seal of the Supreme Court of Missouri.

In testimony whereof I hereunto set my hand and affix the seal of said court, at office, in the city of Jefferson, this 18th day of March, 1891.

HENRY W. EWING, *Clerk,*
By ROWAN RAY, *D. C.*

Endorsed on cover: Case No. 14,566. Missouri supreme court. Term No., 120. E. S. Emert, plaintiff in error, *vs.* The State of Missouri. Filed April 4, 1891.

152-196

Supreme Court of the United States

OCTOBER TERM, 1898

No. 196.

E. S. EMERT, PLAINTIFF IN ERROR,

vs.

THE STATE OF MISSOURI.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

BRIEF FOR THE PLAINTIFF IN ERROR.

JUDD & DETWEILER, PRINTERS, WASHINGTON, D. C.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

No. 120.

E. S. EMERT, PLAINTIFF IN ERROR,

vs.

THE STATE OF MISSOURI.

IN ERROR TO THE SUPREME COURT OF THE STATE OF MISSOURI.

BRIEF FOR THE PLAINTIFF IN ERROR.

STATEMENT OF THE CASE.

The Revised Statutes of Missouri (1889) declare that whoever deals in the selling of goods or merchandise, other than books, charts, maps, and stationery, "by going from place to place to sell the same" is a peddler (sec. 7211); that no person shall deal as a peddler without a license (sec. 7212); that there shall be paid on all peddlers' licenses a State tax varying in amount according as the peddler travels on foot, by horse, cart, or boat (sec. 7217), and that "every person

who shall be found dealing as a peddler contrary to law" shall forfeit, if a foot peddler, $10; if a peddler on horse, $25, and, if a peddler by cart or other land carriage, $50 (sec. 7218).

On June 26, 1889, the plaintiff in error was in the employ of the Singer Manufacturing Company, a corporation organized under the laws of the State of New Jersey and a citizen of that State, on a salary, and on that day, in pursuance of said employment, was engaged in going from place to place in Montgomery county, Missouri, with a horse and wagon, soliciting orders for the sale of Singer sewing machines, having with him in said wagon a certain new Singer sewing machine, which on said day he offered for sale to various persons at different places in said county, and on said day did find a purchaser for said machine, and did sell and deliver the same to David Portucheck, in said county, having at the time no peddlers' license. For this offense he was found guilty under section 7218 in the circuit court of Montgomery county and fined $50, and the sentence was affirmed by the supreme court of the State (State *vs.* Emert 103 Mo., 241). The sewing machine in question was the property of the Singer Manufacturing Company, by whom it had been manufactured at its works in the State of New Jersey and forwarded to the State of Missouri and delivered there to the plaintiff in error, as its agent, for sale on its account, and was, in fact, sold on its account.

Assignment of Errors.

The plaintiff in error insists that the statute in question, as applied to him, is in contravention of the commerce

clause of the Federal Constitution, and that the supreme court of Missouri erred in overruling his plea to that effect.

Argument.

The plaintiff in error submits that the transaction in which he was engaged and for which he was punished was interstate commerce. If so, it was not competent for the State of Missouri to tax him for the privilege of making the sale. The Singer Manufacturing Company is not contesting the right of the State of Missouri to tax its property within that State *as property* in accordance with the rules governing the taxation of other property, and as the coal was taxed in *Brown vs. Houston*, 114 U. S., 622. It simply insists that under the Federal Constitution it has the right, in the absence of congressional prohibition, not only to carry the goods which it manufactures in New Jersey into the State of Missouri, but to sell them in that State, and that the State of Missouri has no power to prevent it from making such sales or to tax it for the *privilege*.

I.

The tax complained of is not a tax upon the PROPERTY *of the Singer Company in Missouri. The company is taxed upon its property in that State under the general revenue laws of the State. This is an additional tax for the* PRIVILEGE OF SELLING *its machines in a certain way.*

It is sometimes said that a license tax is in effect a tax upon property, but it is submitted that the statement is not accurate. A tax upon property, as property, is assessed

with reference to the amount and value of the property; but the statute complained of takes no account of the amount or value of property. The tax is in terms and effect a license tax for the *privilege of selling* or offering to sell goods during a certain time in a certain way, to wit, "by going from place to place and selling the same," without reference to the amount or value of the goods carried or sold.

With respect to the particular machine in question the agreed statement of facts shows nothing more than that it was manufactured by the Singer Company at its works in New Jersey, and was forwarded as a matter of interstate commerce to Emert, as its agent in Missouri, to be sold by him on its account, and that he made the sale on its account. It does not appear that Emert ever carried with him or ever sold or delivered any machines save this one, or that he ever carried this machine or had it in his possession at any time prior to the day of sale, and the assumption to the contrary in the opinion of the supreme court of Missouri is not warranted by the facts; but if this court shall assume without evidence, especially in a criminal case, that the Singer Company sends its machines from its factory in New Jersey to offices or depots in the State of Missouri, and that they are kept at such agencies for sale, the general revenue laws of the State provide for the taxation of such stocks of machines *as property.*

Rev. Stats. 1889, chap. 111, sec. 6894, provides that—

> "Every person or copartnership of persons, who shall deal in the selling of goods, wares, and merchandise, including clocks, at any store, stand, or place occupied for that purpose, is declared to be a merchant."

Section 6896 provides that—

> "Merchants shall pay an *ad valorem* tax equal to that which is levied upon real estate, on the highest amount of all goods, wares, and merchandise which they may have in their possession or under their control, whether owned by them or consigned to them for sale, at any time between the first Monday of March and the first Monday in June in each year: *Provided*, That no commission merchant shall be required to pay any tax on any unmanufactured article, the growth or produce of this or any other State, which may have been consigned for sale, and in which he has no ownership or interest other than his commission."

Subsequent sections provide for returns and assessments in accordance with the foregoing rule of taxation, so that the Singer Company with respect to stocks of machines held by it at any of its offices in the State is compelled to pay an ad valorem tax, equal to that which is levied on real estate, on the highest amounts of goods, wares, and merchandise which it has in its possession or under its control at any time between the first Monday in March and the first Monday in June in each year. This writ of error does not involve the right to levy such taxes.

II.

The right secured by the Federal Constitution to the citizens of other States to engage in commerce with the citizens of Missouri includes not only the right to import their goods into Missouri, but to sell them there after importation. The right to import is of no benefit, shorn of the right to sell. Missouri can no more prevent or tax the one than the other.

In Brown *vs.* Maryland, 12 Wheat., 419, Chief Justice Marshall said (p. 439):

> "There is no difference in effect between a power to prohibit the sale of an article and a power to prohibit its introduction into the country. The one would be a necessary consequence of the other. No goods would be imported if none could be sold."

And again (p. 446):

> "If this power [of Congress to regulate interstate commerce] reaches the interior of a State, and may be there exercised, it must be capable of authorizing the sale of those articles which it introduces. Commerce is intercourse; one of its most ordinary ingredients is traffic. It is inconceivable that the power to authorize this traffic, when given in the most comprehensive terms, with the intent that its efficacy should be complete, should cease at the point when its continuance is indispensable to its value. *To what purpose should the power to allow importation be given, unaccompanied with the power to authorize a sale of the thing imported? Sale is the object of importation, and is an essential ingredient of that intercourse of which importation constitutes a part. It is as essential an ingredient, as indispensable to the existence of the entire thing, then, as importation itself. It must be considered as a component part of the power to regulate commerce. Congress has a right not only to authorize importation, but to authorize the importer to sell.*
>
> "If this be admitted, and we think it cannot be denied, what can be the meaning of an act of Congress which authorizes importation and offers the privilege for sale at a fixed price to every person who chooses to become a purchaser? How is it to be construed if an intent to deal honestly and fairly, an intent as wise as it is moral, is to enter into the construction? What can be the use of the contract, what does the importer purchase, if he does not purchase the privilege to sell?"

Again, on page 448:

> "We think, then, that if the power to authorize a sale exists in Congress, *the conclusion that the right to sell is connected with the law permitting importation as an inseparable incident is inevitable.*"

Again, on page 449:

> "It may be proper to add that we suppose the principles laid down in this case to apply equally to importations from a sister State."

The question whether the right to import an article of interstate commerce from one State to another includes by necessary implication the right to sell it was much considered in *Bowman vs. Chicago, etc., R. R. Co.*, 125 U. S., 465, but was not decided. The argument there was "that the right of a State to restrict or prohibit sales of intoxicating liquor within its limits, conceded to exist as a part of its police power, implies the right to prohibit its importation, because the latter is necessary to the effectual exercise of the former." "The argument," said Mr. Justice Matthews, "is that a prohibition of the sale cannot be made effective except by preventing the introduction of the subject of the sale; that if its entrance into the State is permitted the traffic in it cannot be suppressed; but the right to prohibit sales, so far as conceded to the States, arises *only after the act of transportation has terminated*, because the sales which the State may forbid are of things within its jurisdiction."

The views held by Mr. Justice Matthews upon the main question are easily discovered from the following passage from his opinion (page 499):

> "It is easier to think that the right of importation from abroad and of transportation from one State to

another includes, by necessary implication, the right of the importer to sell in unbroken packages at the place where the transit terminates; *for the very purpose and motive of that branch of commerce which consists in transportation is that other and consequent act of commerce which consists in the sale and exchange of the commodities transported.* Such, indeed, was the point decided in the case of *Brown vs. Maryland*, 12 Wheat, 419, as to foreign commerce, with the express statement, in the opinion of Chief Justice Marshall, that the conclusion would be the same in a case of commerce among the States. But it is not necessary now to express any opinion upon the point, because that question does not arise in the present case."

In his separate concurring opinion Mr. Justice Field, after examining the question, says (page 505):

"Assuming, therefore, *as correct doctrine that the right of transportation carries the right to sell the article imported*, the decision in the Kansas case may perhaps be reconciled with the one in this case by distinguishing," etc.

The precise question came up later in *Leisy vs. Hardin*, 135 U. S., 100. The conclusion of the Court is shown by the following passage from the opinion of Mr. Chief Justice Fuller (page 124):

"The plaintiffs in error are citizens of Illinois, are not pharmacists and have no permit, but import into Iowa beer, which they sell in original packages, as described. Under our decision in Bowman *vs.* Chicago, &c., Railway Co., *supra*, they had the right to import this beer into that State, and in the view which we have expressed *they had the right to sell it, by which act alone it would become mingled in the common mass of property within the State. Up to that point of time* we hold that in the absence of Congressional permission to do so the State had no power to interfere by seizure or any other action in prohibition of importation and sale by the foreign or non-resident importer."

The argument by which this conclusion was reached and the effect of the decision in Brown *vs.* Maryland are shown in a previous passage from the opinion of the Chief Justice (page 110):

> "In Brown *vs.* Maryland, the act of the State legislature drawn in question was held invalid as repugnant to the prohibition of the Constitution upon the States to lay any impost or duty upon imports or exports, and to the clause granting the power to regulate commerce; and it was laid down by the great magistrate who presided over this court for more than a third of a century, that the point of time when the prohibition ceases and the power of the State to tax commences, is not the instant when the article enters the country, but when the importer has so acted upon it that it has become incorporated and mixed up with the mass of property in the country, *which happens when the original package is no longer such in his hands;* that the distinction is obvious between a tax which intercepts the import as an import on its way to become incorporated with the general mass of property and a tax which finds the article already incorporated with that mass by the act of the importer; that as to the power to regulate commerce none of the evils which proceeded from the feebleness of the Federal Government contributed more to the great revolution which introduced the present system than the deep and general conviction that commerce ought to be regulated by Congress; that the grant should be as extensive as the mischief and should comprehend all foreign commerce and all commerce among the States; that that power was complete in itself, acknowledged no limitations other than those prescribed by the Constitution, was coextensive with the subject on which it acts and not to be stopped at the external boundary of a State, but must be capable of entering its interior; *that the right to sell any article imported was an inseparable incident to the right to import it,* and that the principles expounded in the case applied equally to importations from a sister State. Manifestly this must be so, for the same public policy applied to commerce among the States as to foreign commerce,

and not a reason could be assigned for confiding the power over the one which did not conduce to establish the propriety of confiding the power over the other."

III.

If the transaction in which Emert was engaged was interstate commerce, the imposition of a license tax is a "regulation" within the meaning of the Constitution.

In *Brennan vs. Titusville*, 153 U. S., 289, 304, Mr. Justice Brewer, speaking of *Welton vs. State of Missouri*, 91 U. S., 275, said:

> "It is true that the case turned largely upon the fact of discrimination between products of other States and those of Missouri, but nevertheless *the decision is an adjudication that the imposition of a license tax on the peddling of goods is a regulation of commerce.*"

And again, page 298:

> "It is true, also, that the tax imposed is for selling in a particular manner, but a regulation as to the manner of sale, whether by sample or not, whether by exhibiting samples at a store or at a dwelling-house, is surely a regulation of commerce."

IV.

It is immaterial that the statute "regulates" those who are engaged in internal commerce equally with those engaged in interstate commerce. Robbins vs. Shelby County Taxing District, 120 U. S., 489; *Asher vs. Texas*, 128 U. S., 129; *Brennan vs. Titusville*, 153 U. S., 289.

A State cannot prevent a person from engaging in interstate commerce or tax him for the privilege, and it does not

acquire the right to do so by also regulating persons engaged in internal commerce of the same sort. The prohibition is not against regulating interstate commerce by a discriminating regulation, but against regulating it at all.

The case of *Machine Co. vs. Gage*, 100 U. S., 676, overlooks this fundamental distinction. It is the case upon which the decision of the supreme court of Missouri is based, and is a constant source of confusion. It is submitted that it should now be overruled in terms as it has been in effect by numerous subsequent decisions of this Court.

In *Robbins vs. Shelby Taxing District*, 120 U. S., 489, 497, Mr. Justice Bradley said:

> "It is strongly urged, as if it were a material point in the case, that no discrimination is made between domestic and foreign drummers—those of Tennessee and those of other States; that all are taxed alike. But that does not meet the difficulty. Interstate commerce cannot be taxed at all, even though the same amount of tax should be laid on domestic commerce or that which is carried on solely within the State. This was decided in the case of *The State Freight Tax*, 15 Wall., 232."

Speaking of the decision in *Robbins vs. Shelby Taxing District*, Mr. Justice Brewer, in *Brennan vs. Titusville*, 153 U. S., 289, 304, said:

> "The statute made no discrimination between those who represented business houses out of the State and those representing like houses within the State. There was, therefore, no element of discrimination in the case, but, nevertheless, the conviction was set aside by this court on the ground that, whatever the State might see fit to enact with reference to a license tax upon those who acted as drummers for houses within the State, it could not impose upon those who acted as drummers for business houses outside of the State (and who were therefore engaged in interstate commerce) any burden by way of a license tax."

V.

It is immaterial that the Singer Company is a corporation. Gloucester Ferry vs. Pennsylvania, 114 U. S., 196, *Crutcher vs. Kentucky,* 141 U. S., 47.

The doctrine is now firmly settled that interstate commerce by a corporation is entitled to the same protection as when carried on by individuals.

As long ago as *Pensacola Telegraph Company vs. Western Union Telegraph Company,* 96 U. S., 1, 12, Chief Justice Waite said:

> "We are aware that in *Paul vs. Virginia,* 8 Wall., 168, this Court decided that a State might exclude a corporation of another State from its jurisdiction, and that corporations are not within the clause of the Constitution which declares 'that the citizens of each State shall be entitled to all privileges and immunities of citizens in the several States.' Article 4, section 2. That was not, however, the case of a corporation engaged in interstate commerce, and enough was said by the court to show that if it had been very different questions would have been presented. The language of the opinion is: 'It is undoubtedly true, as stated by counsel, that the power conferred upon Congress to regulate commerce includes as well commerce carried on by corporations as commerce carried on by individuals. * * * This state of facts forbids the supposition that it was intended in the grant of power to Congress to exclude from its control the commerce of corporations. *The language of the grant makes no reference to the instrumentalities by which commerce may be carried on. It is general, and includes alike commerce by individuals, partnerships, associations, and corporations.*'" * * *

In *Crutcher vs. Kentucky,* 141 U. S., 47, 58, it is said:

> "It is well settled by numerous decisions of this Court that a State cannot, under the guise of a license tax, ex-

clude from its jurisdiction a foreign corporation engaged in interstate commerce or impose any burdens upon such commerce within its limits.

"We have repeatedly decided that a State law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it. Pickard *vs.* Pullman Southern Car Co., 117 U. S., 34; Robbins *vs.* Shelby County Taxing District, 120 U. S., 489; Leloup *vs.* Mobile, 127 U. S., 640; Asher *vs.* Texas, 128 U. S., 129; Stoutenburgh *vs.* Hennick, 129 U. S., 141; McCall *vs.* California, 136 U. S., 104; Norfolk & Western Railroad Co. *vs.* Pennsylvania, 136 U. S., 114."

VI.

The question, after all, is simply whether the transaction in which Emert was engaged and for which he was punished was interstate commerce. If so, it was not within the regulating power of the State of Missouri. What Emert did was to negotiate the sale of merchandise. That was clearly an act of commerce, and the only question is whether it was domestic commerce or interstate commerce. It is admitted (*Brennan vs. Titusville*) that if Emert had negotiated the sale prior to the arrival of the machine in Missouri the transaction would have been an act of interstate commerce. Why? Because it was a step taken for the purpose of effecting a sale and delivery in one State of goods from another State. But what difference does it make whether the sale precedes the arrival of the goods or is made contemporaneously with their arrival or after their arrival, provided the goods remain the property of the shipper until sold, and were shipped by him for the sole purpose of being sold in the State to which they were sent. The protection of the Constitution is not confined to interstate commerce in which

sale precedes shipment. It extends to all interstate commerce, whether the vendor sells in advance of shipping or whether he accompanies the goods personally or by agent into the foreign State to sell them there as best he can and as soon as he can. It will be noticed that it is not the fact of sale that makes one liable under the Missouri statute. It is for the privilege of *trying* to sell "by going from place to place" that the tax is imposed.

I submit that where a thing like a machine is sent from one State to another for the sole purpose of being there sold that the State to which it is sent cannot "regulate" the manner in which it shall be sold by forbidding the owner to go "from place to place to sell the same." If the States can establish that regulation, there is no limit to the restrictions which they may impose upon interstate commerce. The only safe doctrine is that announced in *Brown vs. Maryland* and reaffirmed in *Leisy vs. Hardin*—that "the right to sell any article imported is an inseparable incident of the right to import it." It was contended by the dissenting justices in the latter case that this right of sale is subject to the exercise of the police power of the State in the case of deleterious substances, but no such question is involved at bar. Upon the vital question that the Federal Constitution guaranties the right to sell as an inseparable incident of the right to import, there was no disagreement. I respectfully submit that the judgment should be reversed.

LAWRENCE MAXWELL, JR.,
Counsel for Plaintiff in Error.

SENECA N. TAYLOR,
Of Counsel.

IN THE

Supreme Court of the United States.

OCTOBER TERM, 1894.

E. S. EMERT,
PLAINTIFF IN ERROR,
vs.
THE STATE OF MISSOURI.
No. 120.

STATEMENT, ABSTRACT AND BRIEF FOR PLAINTIFF IN ERROR.

On July 15th, 1889, E. S. Emert, plaintiff in error, was arrested on a warrant issued by a justice of the peace of Montgomery County, Missouri, charging him with selling and peddling sewing machines, and other wares and merchandise, and particularly one sewing machine, to one David

Portucheck, without license, contrary to law, and against the peace and dignity of the State. Transcript, p. 3.

An information was filed by the county attorney before such justice charging "*that E. S. Emert on the 26th day of June, 1889, at said county of Montgomery, did then and there unlawfully deal in the selling of goods, wares and merchandise, not being books, charts, maps or stationery, by going from place to place in a cart or spring wagon with one horse to sell the same, and did then and there, while going from place to place to sell said goods, wares and merchandise aforesaid, unlawfully sell one sewing machine to David Portucheck without then and there having a license as a peddler, or any other legal authority to sell the same, against the peace and dignity of the State.*"

The statute relating to peddlers and their licenses, under which this prosecution was had, is brief, and for the convenience of the court, is, so far as necessary to understand the case, set forth below in full, as found in the revised statutes of Missouri, 1889, chapter 125, page 1682.

PEDDLERS AND THEIR LICENSES.

"Sec. 7211. **Certain persons declared to be peddlers.**— Whoever shall deal in the selling of patents,

patent rights, patent or other medicines, lightning rods, wares or merchandise, except books, charts, maps and stationery, by going from place to place to sell the same, is declared to be a peddler.

"Sec. 7212. **Not to deal without a license, etc.— not to sell liquors.**— No person shall deal as a peddler without a license; and no two or more persons shall deal under the same license, either as partners, agents or otherwise; and no peddler shall sell wines or spirituous liquors.

"Sec. 7213. **What the license shall state.**— Every license shall state the manner in which the dealing is to be carried on, whether on foot, or with one or more beasts of burden, the kind of cart or carriage, or, if on the water, the kind of boat or vessel to be employed.

"Sec. 7214. **Clerk to issue blank licenses — to charge them to collector.**— The clerk of the county court shall from time to time issue under the seal of the court, as many blank peddler's licenses of the several kinds as may be necessary, deliver the same to the collector of the county, and charge such collector therewith.

"Sec. 7215. **County court to settle with collector.**— The county court shall, at each regular term thereof,

settle with the collector of the county on account of such licenses, and charge him with all the licenses not returned, and give him credit for such as are returned; and said court shall cause the amount thus charged against such collector to be certified to the State auditor.

"Sec. 7216. **Who may obtain a peddler's license.**— Any person may obtain a peddler's license by application to the collector of the county in which he intends to carry on his trade, by paying the amount levied on such license.

"Sec. 7217. **Rates of tax on peddlers' licenses.**— There shall be levied and paid on all peddler's licenses *a State tax of the following rates:* First, if the peddler travel and carry his goods on foot, three dollars for every period of six months; second, if one or more horses or other beasts of burden, ten dollars for every period of six months; third, if a cart or other land carriage, twenty dollars for every period of six months; fourth, if in a boat or other river vessel, at the rate of one dollar per day for any period not less than five days, and such licenses may be renewed at the expiration of the first license, for any period not greater than six months, on payment of fifty cents a day, the number of days to be specified in such license. Any county court may, by an

order of record, require all peddlers doing business in their county to pay a license tax not greater than that levied for State purposes."

On hearing before the justice, the accused was adjudged guilty of a misdemeanor as charged in the complaint and fined fifty dollars and costs.

Plaintiff in error appealed from this judgment to the circuit court of Montgomery County, where the case was tried May 5th, 1890, before the court without a jury, upon an agreed statement of facts, which, omitting the title, reads as follows:—

"*For the purpose of dispensing with evidence in the above entitled cause in the circuit court, it is agreed by and between the parties to said cause that the following are the facts in said case, and that said cause may be decided by the court on the following agreed statement, to wit:—*

"*1st. That for more than five years last past the Singer Manufacturing Company has been, and still is, a corporation, duly organized under the laws of the State of New Jersey and a citizen of that State.*

"*2d. That on and prior to the 26th day of June, 1889, E. S. Emert, defendant, was in the em-*

ploy of said Singer Manufacturing Company on a salary for his services, and at said time, in pursuance of said employment, was engaged in going from place to place in said Montgomery County, Missouri, with a horse and wagon, soliciting orders for the sale of Singer sewing machines, having with him in said wagon a certain New Singer sewing machine, which on said day he offered for sale to various persons at different places in said county, and that on said day the defendant did find a purchaser for said machine and did sell and deliver the same to David Portucheck in said county.

"*3d. That said Singer machine in question was manufactured by said 'The Singer Manufacturing Company' at its works in the State of New Jersey, and that said sewing machine belonged to and was the property of said company, and that it was forwarded to this State by said company and by it delivered to defendant as its agent for sale on its account, and said machine was sold on account of the said manufacturing company; that said machine was of the value of fifty dollars; that the defendant had no peddler's license at said time.*" Transcript, pp. 7 and 8.

On this agreed statement of facts the court found the defendant guilty as charged, and assessed his

punishment at a fine of fifty dollars, which judgment concludes in the following language:—

"It is therefore considered, ordered and adjudged by the court that the plaintiff have and recover of defendant the said sum of fifty dollars ($50.00), as found and assessed by the court aforesaid, together with her costs of suit in this behalf expended, *and that defendant stand committed until said fine and costs are paid, and that execution issue therefor.*"

On the day of the rendition of judgment, Emert filed his motion for a new trial, stating several grounds, among which are these: *because he is charged with no offense known to the law; because the facts stated in the agreed statement constituted no offense; because the statute under which he is prosecuted is in contravention of the constitution of the United States and is void; because the statute under which defendant is charged and convicted is in violation of section 8, article I., of the constitution of the United States, and void in so far as it applies to the defendant herein; because upon the case as made, the finding and judgment should have been for the defendant.* Transcript, p. 8.

A bill of exceptions was filed, and the case in due course was appealed by Emert to the Supreme Court of Missouri (Transcript, p. 13), where the

following assignment of errors were alleged as reasons for reversal:—

"*First.* The court erred in holding appellant guilty upon the agreed statement.

"*Second.* The court erred in not holding the law under which appellant was prosecuted, as applied to the agreed statement, to be in conflict with the constitution of the United States and therefore void:

1st. Because the license in question is an impost on imports, and therefore violates art. 1, sec. 10, of the constitution, which provides that 'no State shall, without the consent of Congress, lay any imposts or duties or imports or exports, except what may be absolutely necessary for executing its inspection laws.'

2d. Because the license is a tax, and is an interference with interstate commerce, and therefore violates art. 1, sec. 8, which provides that Congress shall have power to 'regulate commerce * * * among the several States.'" Transcript, pp. 18–19.

The Supreme Court of Missouri affirmed the judgment of the Circuit Court of Montgomery County, January 27th, 1891 (see Supreme Court Rep., Vol. 103, p. 241). Transcript, pp. 20–25.

Thereupon Emert sued out a writ of error from the United States Supreme Court.

ASSIGNMENT OF ERRORS IN UNITED STATES SUPREME COURT.

The Supreme Court of Missouri, upon the agreed statement of facts, erred:

1st. In holding plaintiff in error guilty of any offense known to the law;

2d. In holding the statute, as applied to the case at bar, constitutional;

3d. In not holding the license in question a tax on interstate commerce, and the statute exacting it void, because in conflict with article I., section 8, of the constitution of the United States, which provides, that Congress shall have power "to regulate commerce * * * among the several States."

QUESTION.

The vital question in this case is whether a corporation engaged in the manufacture of sewing machines in a State of which it is a citizen, can employ an agent, in another State, upon a salary, to solicit orders for the sale of such machines, by

going from place to place with a horse and wagon carrying with him one such machine, one day only, in an original package and offering it for sale to various persons and finally selling it, without paying to the latter State a tax for the privilege of thus soliciting orders and selling the one machine which he carried?

POINTS AND AUTHORITIES.

I. Point.

The license fee exacted of plaintiff in error as a condition precedent to selling the machine in question, was in effect a tax on the machine sold. It is declared a tax by the terms of the statute; but even if the statute did not so define it, still the law would classify it as a tax upon the article to be sold.

Brown v. Md., 12 Wheat. 419;
Welton v. Missouri, 91 U. S. 275;
County of Mobile v. Kimbal, 102 U. S. 691;
Sherlock v. Albany, 93 U. S. 102;
Cook v. Pennsylvania, 97 U. S. 566;
Ferry Company v. Pennsylvania, 114 U. S. 196;
Robbins v. Shelby County Tax. Dist., 120 U. S. 489;
Leisy v. Hardin, 135 U. S. 100;
Walling v. Michigan, 116 U. S. 446;
State Freight Tax Case, 82 U. S. 232;
Brennan v. Titusville, 153 U. S. 282.

II. Point.

The police power of a State cannot obstruct interstate commerce beyond the necessity for its exercise; nor

Norfolk R. R. Co. v. Pa., 136 U. S. 114;
Brennan v. Titusville, 153 U. S. 282.

VI. Point.

The Missouri statute, so far as it applies to the case at bar, is in conflict with Sec. 8, Art. I., of the constitution of the United States, which provides that Congress shall have power to regulate commerce among the several States.

Gibson v. Ogden, 9 Wheat. 1;
Brown v. Md., 12 Wheat. 419;
Welton v. Missouri, 91 U. S. 275;
Almy v. California, 65 U. S. 169;
County of Mobile v. Kimbal, 102 U. S. 691;
Robbins v. Shelby County Taxing Dist., 120 U. S. 489;
Leisy v. Hardin, 135 U. S. 100;
Brennan v. City of Titusville, 153 U. S. 289.

ARGUMENT.

The agreed statement of fact is clear and explicit, and leaves no room for doubt, as to the ultimate facts upon which Emert's conviction rests.

According to the agreed case, "on and prior to the 26th day of June, 1889, E. S. Emert, defendant, was in the employ of said Singer Manufacturing Company on a salary for his services, and at said time, in pursuance of said employment, was engaged in going from place to place in said Montgomery County, with a horse and wagon, soliciting orders for the sale of Singer sewing machines, having with him in said wagon a certain new Singer sewing machine, which on said day he offered for sale to various persons at different places in said county, and on said day the defendant did find a purchaser for said machine and did sell and deliver the same to David Portucheck in said county."

Now, this is all the agreed case, by any possible construction, shows that Emert did. There is not the slightest intimation that he ever carried with him, in his wagon, at any time, or under any circumstances, any machine or any property save this one new Singer sewing machine.

The agreed case also makes it conclusive, that the Singer Manufacturing Company is a corporation under the laws of New Jersey and a citizen of that State, and that the machine which Emert sold was manufactured by that company at its works in New Jersey, and was forwarded as a matter of interstate commerce to Emert as its agent in Missouri, to be sold by him for its account, and, that he made such sale on its account, he, at the time, having no peddler's license.

As before stated, there is no basis for the assertion in this record that Emert ever carried with him, or ever sold or delivered, any machine save this one mentioned in the agreed case, or that he ever carried said machine, or had it in his possession, at any time prior to the 26th day of June, 1889.

Yet the Supreme Court of Missouri, after quoting the agreed statement of facts verbatum (103 Mo. 243), at page 247, uses this language: "Defendant was engaged in going from place to place selling, and trying to sell, sewing machines in Montgomery County in this State. *And had been so engaged for several years. He carried machines with him in a wagon, and on making a sale delivered those sold to the purchaser.*" Now, by what rule of construction that court could stretch one day into some years, and one machine into machines is inexplicable. Yet, the Supreme Court of Missouri,

without warrant of fact or law, did thus construe the agreed statement of facts.

It seemed important to call attention to the above misstatement of facts by that court, because it is insisted that the case legitimately turns on the question, whether the new Singer sewing machine, *and the only machine ever offered for sale or sold by Emert*, so far as this court can be advised, or the Supreme Court of Missouri was advised, *was an article of interstate commerce, when carried and when sold by Emert, according to a fair interpretation of the agreed case.*

The license tax demanded of Emert as a condition precedent to selling the machine, in question, was, in effect, a tax on the machine itself. This proposition is obvious, and has been repeatedly affirmed by this court, nor is it denied by the Supreme Court of Missouri. For the latter court admits that the machine was an article of interstate commerce, when delivered by the manufacturing company to its agent, Emert, for sale; but it holds that as soon as he undertook to find a purchaser for it in the manner he did, it then came within the taxing power of the State, and the sale without a license made him amenable to the penalties of the law.

Nothing is clearer from reason, or better established by this court, than that the power vested in

Congress by the constitution, to regulate commerce between the several States, is a power complete in itself, and cannot be interfered with by the legislative acts of any State; and, that this protection does not stop at the external boundary of the State, but follows articles of interstate commerce into any State where sent for sale, and there protects them against any State interference with the sale, until sold or until the articles become mingled with the common mass of property of the State. Such has been the construction of this constitutional restriction for over seventy years. It was first so held in Brown *v.* Maryland, 12 Wheat. 419, in 1827, and finally in Brennan *v.* City of Titusville, 153 U. S. 289, in 1894. These, therefore, are no longer propositions open for construction.

The Supreme Court of Missouri, in effect, held the mere fact, that Emert, as agent of the manufacturing company, received the machine in Missouri for the purpose of selling it, *caused it at once to lose its identity as a thing of interstate commerce*, and caused it to become mingled with, and a part of the common mass of property of that State, and hence liable to taxation the same as other property in the State. With all deference to that learned court, it is submitted its view is unsound, and will not stand the test of reason and is opposed to the decisions of this court. The machine in question was a

matter of traffic, and remained the property of the manufacturing company until sold. It was sent to Missouri expressly for sale, and not for use by the company. Beyond question, under the Federal constitution, the machine was when delivered to Emert an article of interstate commerce. How then could the mere fact, that it had a situs only one day in Missouri, before it was sold, remove the shield of the Federal constitution? Was it not still an article of commerce, and within the category of interstate commerce? Did not its origin, ownership, and the object for which it was sent into Missouri make it such? It was manufactured by a citizen of New Jersey, and sent by such citizen to its agent in Missouri to be sold to some citizen of the latter State. It was a thing distinguishable and separate from the mass of property owned by citizens of Missouri, unless the mere fact, that the machine, being for one day within the territorial lines of Missouri for sale, caused it to become a part of the common mass of property of the State. *The machine was in its nature an original package in which it was shipped, complete in itself and in the same condition as when so forwarded from New Jersey to Missouri, as an article of interstate commerce, for sale.*

How can it be said that the person thus introducing an article of interstate commerce into another

State is protected by the constitution, if this protection stops at the external boundary of the State? What object could the manufacturing company have had in introducing the machine into Missouri, if it might not sell it unrestricted when so delivered? It is submitted, if the moment an article reaches the interior of the State to which it is sent for sale, it becomes subject to taxation as a condition precedent to the sale, then it follows, inevitably, that there is an authority and an interference on the part of the State with interstate commerce. *For interstate commerce, in the sense of traffic, has reference to the selling of an article by a citizen of one State to a citizen of another State.* Now, if the article is forwarded from one State to another for the purpose of effecting a sale to some citizen of the latter State, surely the traffic is not completed until the sale is consummated. It would seem therefore from reason that an article remains one of interstate commerce, not only while in transit from the State where manufactured until it enters the interior of the other State, but, also, until the traffic is completed by a sale and delivery of the article; or at least until the owner has so acted upon the article as to cause it to be mingled with the common mass of property of the State.

Possession of the machine by Emert, was the possession of the manufacturing company, for a cor-

poration can only hold the physical possession of its property through an agent. It can only act by and through an agent in effecting a sale. The agreed case, then, in law, is precisely the same, as if a natural person had brought this machine into Missouri for the purpose of selling it, and on the morning of his arrival had carried it in a hired livery and sought a purchaser until he found one, and then sold and delivered it on the day of his arrival in Missouri.

If it be conceded that the mere sending the machine in question to Emert, and its remaining in his possession one day, did not place it beyond the protection of the Federal constitution, that is, did not cause it to lose its identity as an article of interstate commerce, then how did it lose that identity? How did it become mingled with the common mass of property in the State, so as to become subject to the legislative imposition of this license tax? For until it lost its identity as a matter of interstate commerce, it is overwhelmingly settled, by reason and authority, that the State possessed no legal right to tax it. Let it be granted for argument's sake that the carrying of this machine by Emert, on the 26th day of June, 1889, in Montgomery County, Missouri, and offering it for sale, fell within the statutory definition of a peddler. That definition is as follows:—

"Whoever shall deal in the selling of patents

* * * or merchandise * * * by going from place to place to sell the same is declared to be a peddler." Let it also be granted that the State had a perfect right to pass such a law for revenue, and that it would be valid, so far as it applied to carrying and selling things not interstate commerce, yet, how can it be said that the carrying of this machine in question from place to place in Montgomery County, if it was an article of interstate commerce the morning that Emert started out with it, caused it to lose this status the moment he offered it for sale? It is insisted that it did not and could not.

Now, the fact that no greater license was demanded of Emert, for selling this article of *interstate commerce,* than was generally required of persons dealing in domestic articles, who sold them by peddling, is not the decisive test in this case. Of course, if a discrimination was made against those dealing in articles manufactured in another State, under many decisions of this court, the legislative act making this discrimination and imposing this burden would be invalid; *but this is not the only test. It has been repeatedly held by this court, that though the law, so far as it applies to matters simply domestic, and so far as it exacts a license fee, or tax, as a requisite to traffic in domestic articles, may be valid, still, if it interferes with interstat commerce, to that extent, it is void.*

Obviously, the placing of the machine in the wagon, which was in the nature of an *original package, or thing*, and carrying it from place to place in Montgomery County, seeking a purchaser, did not constitute a mingling of it with the mass of property owned by citizens of Missouri. The machine remained both separate and distinguishable from the common mass of property in that State, though transported in a wagon, as shown by the agreed case. It was in the possession of the salaried agent of the manufacturing company, not for use, *but for the purpose of consummating the traffic for which it had been forwarded to Missouri*. True, it remained one day within the same territory in which much of the mass of the property taxable, by the laws of the State of Missouri, existed; but, in no rational sense, could that be said to be mingling it with the common mass of property in Missouri, unless it shall be held by this court, that whenever an article chances to be in a county where there is other property, that the mere fact of its situs in such county constitutes a mingling of it with the mass of property of the county. There is not the slightest intimation in any of the decisions of the Supreme Court of the United States, indicating that such a condition of things would constitute a mingling with the mass of property, and it is hard to conceive by what possible construction of

law or fact, it could be held to constitute such a mingling.

The word "mingle" has various significations. It may mean to mix; blend; combine intimately; form a combination. It may imply to form by mixing; blending; combining the parts of; compound or concoct. It may import to bring into relation of association; connect or conjoin. It might indicate to confuse; to impair or spoil by mixture with something. See *Century Dictionary.*

Now, the acts and things done by the foreign manufacturing company through its agent, could not possibly be described by any one of these words or phrases. The machine in question was not mixed with other things, for that implies to make a compound; it was not blended; it was not combined intimately; it was not concocted with anything else to form a combination. There was no mixing; no blending; no combining the parts of; no compounding or concocting, wherein the machine formed a part with other property; nor was it brought into relation or association; connected or conjoined to other property; nor was it confused with other property. *The machine remained constantly a distinct, complete,* an original thing, or package consigned by the foreign manufacturing company to its agent for sale.

Suppose a citizen of Illinois slaughtered a lot of

hogs raised by him in that State, and brought a wagon load of dressed pork to the city of St: Louis for sale, not knowing to whom he would sell the same; and suppose he should drive to several pork-houses before finding a purchaser, could he be lawfully convicted, under the Missouri peddler's law, for having done this without a license?

Could a citizen of Illinois, who raised ten horses upon his farm, and brought them into Missouri, and took them from place to place to find a purchaser, be lawfully convicted for not obtaining a license under the Missouri peddler's law?

If a citizen of Illinois who raised potatoes upon his farm, and carried them in his wagon to St. Louis and there offered them for sale to citizens, could he be held to have violated any law, because he failed to take out a peddler's license as a condition precedent to seeking a purchaser and selling his potatoes?

Would not each and all of these persons, as citizens of the United States, be entitled to bring their merchandise into Missouri, and to sell the same, without any restriction or the paying any tribute to the State of Missouri, by way of a license tax, as a condition precedent? Now, if section 8, article I., of the Federal constitution, would protect the citizens of Illinois in the supposed cases, on what theory can the conviction of Emert be justified in the case at bar?

Clearly, if the supposed cases of traffic would come within the category of interstate commerce, and the protection of the Federal constitution, then so does the Emert case.

The Supreme Court of Missouri, with all due respect to that able tribunal, was unable to point out how the machine in question lost its status as a matter of interstate commerce. But that court claimed its decision to be just, and gave as reasons: "The law places no restrictions or barriers on the commerce of citizens of other States; it imposes no burdens that are not borne equally by citizens of this State. The burdens of taxation are imposed and endured as a recompense for the protection the law affords to persons and property, and that protection is thrown around all alike, the resident citizen, and the citizen of other States."

These are not sufficient grounds for levying the tax in question. The exacting of a license fee of twenty-five dollars as a condition precedent to selling a machine worth fifty dollars, is on its face absurd; and, as was well said by the Supreme Court of New Jersey, in Railroad Company v. State, 31 N. J. L. 531, "The power to tax involves the power to destroy."

In Brown v. Maryland, 12 Wheat. 446, it is said: "Commerce is intercourse; and if the State can lawfully impose the present tax, every State, city,

town or incorporated village of the Union can impose a greater one. Commerce must then cease her labors, withdraw her vehicles, and succumb to the local taxation."

In Welton v. Missouri, 91 U. S. 275, Mr. Justice Field uses this language: "If Missouri can require a license tax for the sale by traveling dealers of goods which are the growth, product or manufacture of other States or countries, it may require such license tax as a condition of their sale from ordinary merchants, and the amount of the tax will be a matter resting exclusively in its discretion."

"*The power of the State to exact a license tax of any amount being admitted, no authority would remain in the United States or in this court to control its action, however unreasonable or oppressive.*"

In Lyng v. Michigan, 135 U. S. 161, the court says: "We have repeatedly held that no State has the right to lay a tax on interstate commerce, in any form whether by way of duties laid on the transportation of the subject of that commerce or on the receipts derived from the transportation, *or on the occupation or business of carrying it on*, for the reason that taxation is a burden on that commerce, and amounts to a regulation of it which belongs solely to Congress."

In Crutcher v. Kentuck, 141 U. S. 47, the court

says: "We have repeatedly decided that a State law is unconstitutional and void which requires a party to take out a license for carrying on interstate commerce, no matter how specious the pretext may be for imposing it."

In the light of these authorities, and numerous others that might be cited, it would seem that the reasoning of the Supreme Court of Missouri fails to meet the case. In each of the cases above cited, the statutes of the respective States were held unconstitutional by this court, yet the person convicted had received the protection of the law, which arises from the civil government of the State. And the mere fact that he had received such protection, was held to be no justification for an infringement of the Federal constitution affecting interstate commerce.

The Supreme Court of Missouri says: "*The framers of the constitution could never have intended to discriminate against any State or the citizen thereof.*" Assuredly not. But the framers of the constitution did intend that interstate commerce should be absolutely free from State control. Any citizen of Missouri has the same right to carry the produce of his farm, or the product of his manufacture, into Illinois and sell it without being required to pay a license, that a citizen of another State has to bring the like product into Missouri

and sell it without paying a tax, or being burdened as a condition precedent to such a sale. *This is the equality which the constitution of the United States insures to citizens of other States.* If it be sound reasoning that on every occasion when the citizen of another State is afforded the protection of the laws of a State, a tax may be exacted of him as compensation therefor, then, every line of cars that passes through any State, destined for another State, would be the proper subject of taxation; every person who sojourns in a State and receives the protection which is afforded by its civil government, could be subject to a pole tax, and thus endless confusion would arise.

The constitution of the United States secures to citizens of every State the right of dealing in interstate commerce in any other State, free from taxation for the support of the local government of that State. Nor is this a discrimination against the citizens of any State. For this protection is afforded alike to the citizens of every State. Whatever advantage or protection is afforded any citizen of New Jersey by the civil government of Missouri, in disposing of articles of interstate commerce in the latter State, without paying to that State a tax for this privilege, is, on the other hand, afforded by the civil government of New Jersey, to any citizen of Missouri to dispose of his articles of interstate com-

merce in New Jersey, without contributing a tax for the support of the government to the latter State. This, beyond question, is equality. It is equality in kind.

In Minnesota v. Barber, 136 U. S. 313, it is held: "A burden imposed by a State upon interstate commerce is not to be sustained simply because the statute imposing it applies alike to the people of all the States, including the people of the State enacting such statute."

In Railroad Co. v. Husen, 95 U. S. 465, Mr. Justice Strong, delivering the opinion of the court, said: "The police power of a State cannot obstruct foreign commerce or interstate commerce beyond the necessity for its exercise; and, under color of it, objects not within its scope cannot be secured at the expense of the protection afforded by the Federal constitution."

In New Orleans Gas Co. v. Louisiana, 115 U. S. 650, Mr. Justice Harlan says: "Definitions of the police power, must, however, be taken subject to the condition, that the State cannot, in its exercise, for any reason whatever, encroach upon the powers of the general government, or rights granted or secured by the supreme law of the land."

In Walling v. Michigan, 116 U. S. 446, Mr. Justice Bradley, speaking for the court, says: "The police power cannot be set up to control

the inhibitions of the Federal constitution, or the powers of the United States government created thereby."

In Leisy v. Hardin, 135 U. S. 108, Mr. Justice Fuller says: "The power vested in Congress 'to regulate commerce with foreign nations and among the several States and with the Indian tribes,' is the power to prescribe the rule by which that commerce is to be governed, is a power complete in itself, acknowledging no limitations other than those prescribed in the constitution. It is co-extensive with the subject on which it acts, and cannot be stopped at the external boundary of the State, but must enter its interior and must be capable of authorizing the disposition of those articles which it introduces, so that they may become mingled with the common mass of property within the territory entered."

Again he says: "If the importation cannot be prohibited without the consent of Congress, when does property imported from abroad, or from a sister State, so become part of the common mass of property within a State as to be subject to its unimpeded control?"

He then says:—

"In Brown v. Maryland, *supra*, the act of the State legislature drawn in question was held invalid as repugnant to the prohibition of the constitution

upon the States to lay any impost or duty upon imports or exports, and to that clause granting the power to regulate commerce; and it was laid down by the great magistrate who presided over this court for more than a third of a century, that the point of time when the prohibition ceases and the power of the State to tax commences is not the instant when the article enters the country, but when the importer has so acted upon it that it has become incorporated and mixed up with the mass of property in the country, which happens when the original package is no longer such in his hands; that the distinction is obvious between a tax which intercepts the import as an import on its way to become incorporated with the general mass of property, and a tax which finds the article already incorporated with that mass by the act of the importer; that, as to the power to regulate commerce, none of the evils which proceed from feebleness of the Federal government contributed more to the great revolution which introduced the present system than the deep and general conviction that commerce ought to be regulated by Congress; that the grant should be as extensive as the mischief, and should comprehend all foreign commerce and all commerce among the States; that that power was complete in itself; acknowledged no limitations other than those prescribed by the constitution, was co-extensive with

the subject on which it acts, and not to be stopped at the external boundary of a State, but must be capable of entering its interior; that the right to sell any article imported was an inseparable incident to the right to import it, and that the principles expounded in the case applied equally to importations from a sister State. Manifestly this must be so, for the same public policy applied to commerce among the States as to foreign commerce, and not a reason could be assigned for confiding the power over the one which did not conduce to establish the propriety of confiding the power over the other. Story Const., Sec. 1066. And although the precise question before us was not ruled in Gibbons v. Ogden and Brown v. Maryland, yet we think it was virtually involved and answered, and that this is demonstrated, among other cases, in Bowman v. Chicago & N. W. R. Co., 125 U. S. 465."

Again Mr. Justice Fuller says: "The conclusion follows that as the grant of the power to regulate commerce among the States so far as one system is required, is exclusive, the State cannot exercise that power without the assent of Congress. In the absence of legislation, it is left for the courts to determine when such action does or does not amount to such exercise, or, in other words, what is or is not a regulation of such commerce. When that is determined, controversy is at an end."

In Crutcher v. Kentucky, 141 U. S. 47, Mr. Justice Bradley said: "But the main argument in support of the decision of the Court of Appeals is that the act in question is essentially a regulation made in the fair exercise of the police power of the State. But it does not follow that everything which the legislature of a State may deem essential for the good order of society and the well-being of its citizens can be set up against the exclusive power of Congress to regulate the operations of foreign and interstate commerce."

In Brennan v. Titusville, 153 U. S. 289, Mr. Justice Brewer, in speaking for the court, says:—

"It is clear, therefore, that this license tax is not a mere police regulation, simply inconveniencing one engaged in interstate commerce, and so only indirectly affecting the business, but is a direct charge and burden upon that business; *and if a State may lawfully exact it, it may increase the amount of the exaction until all interstate commerce in this mode ceases to be possible.* And notwithstanding the fact that the regulation of interstate commerce is committed by the constitution to the United States, the State is enabled to say that it shall not be carried on in this way, and to that extent to regulate it.

"These questions of interference by State regulations with interstate commerce have been fre-

quently before this court, and it may not be unwise to examine a few of them. Welton v. State of Missouri, 91 U. S. 275, presented these facts: Welton was indicted and convicted for acting as a peddler under a statute defining a peddler to be one going from place to place to sell goods not the growth, produce, or manufacture of the State, and prohibiting any one from peddling without a license. The conviction was set aside by this court. *It is true that the case turned largely upon the fact of discrimination between products of other States and those of Missouri, but nevertheless the decision is an adjudication that the imposition of a license tax on the peddling of goods is a regulation of commerce.*"

In the light of these authorities, and upon reason, it is contended that the decision of the Supreme Court of Missouri in Emert's case is wrong. The mere fact that Emert took *the machine, which was in its nature an original package, and carried it, if you please, as a peddler for one day, did not destroy its status as a matter of interstate commerce.* It did not cause it thereby to become mingled with, and a part of, the great mass of property of the State. Surely such is the doctrine announced in Welton v. Missouri, *supra*, and in Brennan v. Titusville, *supra*, and this view is certainly in keeping with sound reason.

The wisdom of the framers of the Federal constitution and the wisdom of the able judiciary whose high prerogative it has been to construe it, is nowhere more conspicuous than in the making of section 8, article I., a part of the constitution by the former, and the reasonable and sound construction of it by the latter. Judicial construction by the State courts has been uniformly in the line of making this provision of the Federal constitution substantially of no avail, and many of their decisions have been of a tenor which would lead to endless confusion in matters of interstate commerce, were it not that power is vested in the Federal Supreme Court to say, thus far and no further shalt thou go, in affecting commerce.

It is submitted that the case should be reversed and the cause remanded, with directions to the Supreme Court of Missouri to reverse its judgment, and enter judgment discharging the plaintiff in error.

Respectfully submitted,

SENECA N. TAYLOR,
Attorney for Plaintiff in Error.

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1894.

E. S. EMERT, PLAINTIFF IN ERROR,

vs.

STATE OF MISSOURI, DEFENDANT IN ERROR.

R. F. WALKER, ATT'Y-GEN'L OF MO.,
For Defendant in Error.

IN THE

Supreme Court of the United States

OCTOBER TERM, 1894.

E. S. EMERT, PLAINTIFF IN ERROR,

vs.

STATE OF MISSOURI, DEFENDANT IN ERROR.

STATEMENT.

The plaintiff in error was prosecuted upon the information filed by the prosecuting attorney of Montgomery county, Missouri, before a justice of the peace, for engaging in the business of a peddler without having a license; upon a hearing before the justice, the plaintiff, who was the defendant below, was found guilty as charged, and fined fifty dollars. He thereupon appealed to the Circuit Court, where, upon a hearing anew, he was again found guilty, and fined fifty dollars and costs. From this judgment he appealed to the Supreme Court of the State, where the judment of the trial court was affirmed. (State vs. Emert, 103 Mo. 241.)

The facts in the case are that E. S. Emert, the plaintiff in error, was, at the time the information was filed against him, employed by the Singer Manufacturing Company, a New Jersey corporation engaged

n the manufacture of sewing machines, to travel from place to place in Missouri, and sell and deliver their machines; that at the time the said plaintiff in error was so employed by said Singer Manufacturing Company in peddling and delivering machines, he had no license so to do; that as the employe of said company he offered for sale, and did sell and deliver to one David Portucheck, in said Montgomery county, Missouri, a Singer sewing machine.

The portions of chapter 125 of the revision of 1889 of the Statutes of the State of Missouri, applicable to this case, are as follows:

SEC. 7211. *Certain persons declared to be peddlers.*—Whoever shall deal in the selling of patents, patent rights, patent or other medicines, lightning rods, goods, wares or merchandise, except books, charts, maps and stationery, by going from place to place to sell the same, is declared to be a peddler.

SEC. 7212. *Not to deal without a license, etc.—not to sell liquors.*—No person shall deal as a peddler without a license; and no two or more persons shall deal under the same license, either as partners, agents or otherwise; and no peddler shall sell wines or spirituous liquors.

SEC. 7217. *Rates of tax on peddlers' licenses.*—There shall be levied and paid on all peddlers' licenses a state tax of the following rates: First, if the peddler travel and carry his goods on foot, three dollars for every period of six months; second, if one or more horses or other beasts of burden, ten dollars for every period of six months; third, if a cart or other land carriage, twenty dollars for every period of six months; fourth, if in a boat or other river vessel, at the rate of one dollar per day for any period not less than five days; and such license may be renewed at the expiration of the first license, for any period not greater than six months, on payment of fifty cents a day, the number of days to be specified in such license. Any county court may, by an order of record, require all peddlers doing business in their county to pay a license tax not greater than that levied for State purposes.

SEC. 7218. *Penalty for dealing as a peddler contrary to law.*—Every person who shall be found dealing as a peddler, contrary to law or the terms of his license, shall forfeit, if a foot peddler, the sum of ten dollars; on one or more beasts of burden, twenty-five dollars; in a cart or other land carriage, fifty dollars; in a boat or other vessel, one hundred dollars.

OPINION OF MISSOURI COURT IN STATE VS. EMERT.

Plaintiff was prosecuted upon information before a justice of the peace, for following the business of a peddler without having license therefor. This case was appealed to the circuit court of Montgomery county, where it was tried, defendant found guilty and a fine of fifty dollars imposed upon him. From the judgment he has appealed to this Court, on the ground that a constitutional question is involved.

The case was submitted to the court upon the following agreed statement of facts:

"For the purpose of dispensing with evidence in the above-entitled cause in the circuit court, it is agreed, by and between the parties to said cause, that the following are the facts in said case, and that said cause may be decided by the court on the following agreed statement, to wit:

"1. That for more than five years last past the Singer Manufacturing Company has been, and still is a corporation, duly organized under the laws of the State of New Jersey, and a citizen of that state.

"2. That on and prior to the 26th day of June, 1889, E. S. Emert, defendant, was in the employ of said Singer Manufacturing Company on a salary for his services, and at said time, in pursuance of said employment, was engaged in going from place to place in said Montgomery county, Missouri, with a horse and wagon, soliciting orders for the sale of Singer sewing machines, having with him in said wagon a certain new Singer sewing machine, which, on said day, he offered for sale to various persons, at different places in said county; and on said day the defendant did find a purchaser for said machine, and did sell and deliver the same to David Portuchek, in said county.

"3. That said Singer machine, in question, was manufactured by said 'Singer Manufacturing Company' at its works in the State of New Jersey, and that said machine belonged to and was the property of said company, and that it was forwarded to this State by said company and delivered to defendant as its agent, for sale on its account, and said machine was sold on account of the said manufacturing company; that said machine was of the value of $50, and the defendant, at the time of said sale, had no peddler's license."

The statute under which defendant was convicted is as follows:

Sec. 7211. Whoever shall deal in the selling of patents, patent rights, patent or other medicines, lightning-rods, goods, uses or merchandise, except books, charts, maps and stationery, by going from place to place to sell the same, is declared to be a peddler."

Sec. 7212. No person shall deal as a peddler without a license; and no two or more persons shall deal under the same license, either as partners, agents or otherwise; and no peddler shall sell wine or spirituous liquors.

Sec. 7217. This section fixes the license fee to be paid for peddling with horse and buggy at $25 for six months, for the use of the State.

Sec. 7219. Fixes a penalty of $50 for dealing as a peddler with horse and wagon without license.

Defendant insists that this statute, as applied to him, under the statement of the facts agreed to, is obnoxious to that provision of the Federal Constitution (Sec. 1, Art. 8) which delegates to Congress the sole power to regulate commerce among the states.

This subject has of late years received much discussion and consideration from the courts of the country, both state and federal, and many of the questions involved have been firmly established. It is conceded by all that a law of a state which imposes a tax upon articles manufactured in, or imported from, another state, as a condition of the right to sell and dispose of them, would be in violation of this provision of the constitution. The difficulty in each case has been to determine the effect of the particular law under consideration. To determine whether in that case the commercial power of the federal government had ceased and the power of the state had commenced. Solving these question as they arose, it has been settled that it matters not whether the tax is imposed directly upon the commodity sold, or by way of license exacted of the persons who make the sales; the restriction on commerce would be the same in either case. (Welton vs. State, 91 U. S. 275; Robbens vs. Shelby Taxing District, 120 U. S. 489.)

By force of these decisions of the court having the highest judicial authority over the subject, it is settled that the sale of goods which are in another state at the time of the sale, for the purpose of introducing them into the state in which the regulation is made, is inter state commerce. That a tax on a sale of such goods before they are brought into the state is a tax on inter state commerce itself. That the imposition of a license tax upon the person making such sale is, in its effect, a tax upon the goods themselves. That a state cannot tax goods beyond its jurisdiction. (Hynes vs. Briggs, 41 Fed. Rep. 469, citing Robbens vs. Taxing Dist., 120 U. S. 489; Brown vs. Houston, 114 U. S. 622; Woodruff vs. Parkhorn, 8 Wall. 123; Cook vs. Benn, 97 U. S. 566; Weton vs. Missouri, 91 U. S. 275.)

It has been equally well settled that as soon as goods are brought into the state and have become a part of its general mass of property,

it becomes taxable in the same manner as other similar property in the State. (Brown vs. Maryland, 12 Wheat. 419; Brown vs. Houston, 114 U. S. 622; Machine Co. vs. Gage, 100 U. S. 676.) The question of most difficulty is to determine, in individual cases, whether the property brought into one state from another has become a part of the general mass of the property of such state. The only rule yet laid down is that so long as it remains in the original package in which it was brought into the state, it is beyond the control of state laws attempting to restrict or prohibit its sale. (Leisy vs. Hardier, 135 U. S. 100.) The rule is more elaborately stated by Chief Justice Marshall, in Brown vs. State of Maryland, *supra*, who, after suggesting the difficulties that might arise in distinguishing between what would be laying a duty on imports, and what would be the acknowledged power of states to tax persons and property within their territory, says: "Yet the distinction exists, and must be marked as the cases arise. Till they do arise, it might be premature to state any rule as being universal in its application. It is sufficient for the present to say, generally, that when the importer has so acted upon the thing imported that it has become incorporated and mixed up with the mass of property of the country, it has perhaps lost its distinctive character as an import, and has become subject to the taxing power of the state; but, while remaining the property of the importer in his warehouse, in the original form or package in which it was imported, a tax upon it is too plainly a duty on imports to escape the prohibition of the constitution." The right of the state to require a license tax on certain avocations, and among them that of a peddler, is not questioned in this case, and has been recognized by the supreme court of the United States in many of the cases bearing on the question. (Machine Co. vs. Gage, 100 U. S. 676.) Whoever shall deal in selling goods, wares and merchandise by going from place to place to sell the same, is declared to be a peddler by the statute. (Sec. 7211.)

Applying these principles to the facts in this case, what is the logical conclusion? Defendant was engaged in going from place to place selling and trying to sell sewing machines, in Montgomery county, in this State, and had been so engaged for some years. He carried the machines with him in a wagon, and in making a sale delivered those sold to the purchaser. He was not only soliciting orders, but was making sales and delivering the property sold.

These acts bring him clearly within the statutory definition of a peddler, and, having no license from the state, he became liable to the penalties imposed by the statute, unless for any reason he was exempt from the operations of the law. This exemption is claimed on the ground

that he was selling the machines as agent for the Singer Manufacturing Company, a corporation under the laws of the State of New Jersey, and a citizen of that state.

It will be observed that the statute now makes no discrimination between the sale of the products of this and any other state, as was the case in Weldon vs. State, 91 U. S. *supra*, and when defendant was engaged in selling these machines, the commercial power of the federal government did not extend over them on account of any discriminating legislation of the state by reason of their foreign character. The only question, then, is whether this property, in the sale of which the defendant was engaged, had lost its distinctive character as an import and become subject to the taxing power of the state, or whether it continued under the protecting power of the Federal government until sold and transferred.

The difficulty suggested by Chief Justice Marshall, of drawing the line of distinction between the restriction upon the power of the state, imposed by the constitution, and the acknowledged power of the state to tax persons and property, meets us here. After careful consideration of the decided cases and the principle involved, we have come to the conclusion that as soon as the defendant, as agent of the foreign manufacturer, undertook to sell a machine in the manner and by the means adopted by him, it came within the taxing power of the state, and a sale thereof, without a license, made him amenable to the penalties of the law. The justice of this conclusion is manifest. The law places no restrictions or barriers on the commerce of citizens of other states; it imposes no burdens that are not borne equally by citizens of this State. The burdens of taxation are imposed and endured, as a recompense for the protection the law affords to person and property, and that protection is thrown around all alike—the resident citizen and the citizen of other states. The non-resident manufacturer and merchant voluntarily places his property under the protection of the laws of this State; can it be unjust to require of him the same tribute that is required of his resident competitor in business? The framers of the constitution could never have intended to discriminate against any state or the citizen thereof. Indeed, it is universally conceded and contended that this commerce clause of the constitution was designed to prevent discriminations, and to encourage and foster free and unrestricted trade among the several states. All that can reasonably be required is to accord to the non-residents rights equal to but not above those of the citizens; that, with respect to the commerce, state lines be obliterated, and the citizens of the Union stand upon the same

footing and have equal opportunities in their contests for trade and business.

We think the conclusion reached entirely consistent with the decisions of the Supreme Court of the United States, and directly borne out by some of them. The case of Machine Co. vs. Gage, 100 U. S. 676, we consider directly in point. The code of Tennessee provided that all peddlers of sewing machines, and selling by sample, should pay a tax of $10. The agent for the Home Machine Company, a corporation of Connecticut, was required to take out license before he was permitted to peddle machines. The company sued to recover back the license fee, on the ground that the law was not valid as applied to one engaged in sale of goods manufactured in another state. Plaintiff was defeated in the highest state court, and the judgment was affirmed on appeal to the United States Supreme Court. (See, also, Waring vs. The Mayor, 8 Wall. 110; Woodruff vs. Parkhorn, 8 Wall 123.) In the dissenting opinion of Waite, C. J., in case of Robbens vs. Taxing District, 120 U. S. 501, he says: "I am unable to see any difference in principle between a tax on a seller by sample and a tax on a peddler, and yet I can hardly believe it would be contended that the provision of the same statute, now in question, which fixes a license fee for all peddlers in the district, would be held to be unconstitutional in its application to peddlers who came with their goods from another state, and expected to go back again." United States Circuit Judge Caldwell of this circuit takes the same position in a case recently decided by him, in which he holds that a foreign corporation selling ranges, which have been previously shipped into the state and there stored, cannot avoid the payment of the license required of stove range agents under the laws of Arkansas, on the ground that he is engaged in interstate commerce. The effect of the decision in that case was that as soon as the ranges were stored for sale they became subject to the taxing power of the state. (Hines vs. Briggs et al., 41 Fed. Rep. 468; see, also, *ex parte* Butin, 28 Tex. App. 304; State vs. Richards, 32 W. Va. 348.)

That the constitution only requires and was only intended to enforce free interchange of commodities between citizens of different states, without regard to state lines, and that citizens of one state should have the right to sell their products in any other state without prejudice or discrimination, we think clearly declared in Woodruff vs. Parkhorn, 8 Wall. 130; Hinson vs. Lott, *Id.* 150; Paul vs. Virginia, *Id.* 168, and many other cases. In Hinson vs. Lott, Mr. Justice Miller for the court, in conclusion, says: "As the effect of the act is such as we have described, and it institutes no legislation which discriminates

against the products of sister states, but merely subjects them to the same rate of taxation which similar articles pay that are manufactured in the state, we do not see in it an attempt to regulate commerce, but an appropriate and legitimate exercise of the taxing power of the state."

The Supreme Court of Pennsylvania, in a recent case (Commonwealth vs. Gardner, 19 Atlantic Rep. 550), similar to the case at bar in nearly every material fact, held that the state law requiring a license of a peddler, though engaged in the sale of goods manufactured and owned by a citizen of another state, was not in contravention of the constitutional provision in respect to commerce among the states, but was simply a police regulation, and under the exclusive control of the state, so long as it made no discrimination against citizens of other states. The argument used is very plausible and would merit careful consideration, did we not put our decision on other grounds, which we believe founded upon the best of reasons, supported by the highest authority, and in perfect accord with the spirit and intent of the constitution.

Holding then, as we do, that defendant was not exempt from the operation of the laws of the state regulating the license of peddlers by reason of the goods sold being the property of a resident of another state, the judgment is affirmed. All concur.

G. B. MACFARLANE.

The plaintiff in error contends that the Supreme Court of Missouri erred:

First, in holding him guilty of any offense known to the law.

Second, in holding the statute under which he was convicted constitutional.

Third, in refusing to hold the license required a tax on inter-state commerce, and the statute under which it was authorized void, as in conflict with Art. 1, sec. 8 of the Constitution of the United States, which provides that Congress shall have power to regulate commerce among the several states.

QUESTION AT ISSUE.

The only question to be considered by this Court is, whether or not goods manufactured in another State and sent by the manufacturer to this State for sale, are, when offered for sale by a peddler, amenable to the license laws of this State; if amenable to the laws of this State, then the conviction of Emert in the trial court, and the subsequent affirmance of the case in the State Supreme Court, were proper and should be upheld.

BRIEF.

I.

Goods sent from one state to another for sale become a part of the general property of the state to which they have been sent, and hence amenable to its laws.

State vs. Emert, 103 Mo. 241.

Ficklin vs. Taxing Dist. Shelby Co., 145 U. S. 1–28.

Robbens vs. Shelby Co. Taxing Dist., 120 U. S. 489.

Brown vs. Houston, 114 U. S. 622.

Machine Co. vs. Gage, 100 U. S. 676.

Brown vs. Md., 12 Wheat. 419.

Hynes vs. Briggs, 41 Fed. Rep. 469.

Com. vs. Gardner, 19 Atl. Rep. 550.

II.

The non-resident manufacturing company which owned the machine cannot expect or demand greater protection or liberty than is accorded resident dealers; being entitled to equal protection with the resident dealer, it must be subject to the same burdens and restrictions.

Hynes vs. Briggs, *supra*.

Brown vs. Houston, *supra*.

Woodruff vs. Parkham, 8 Wall. 123.

III.

Emert, the plaintiff in error, was a peddler.

State vs. Emert, 103 Mo. 241 (247).

Machine Co. vs. Gage, 100 U. S. 676.

Being a peddler, he was subject to the same law as other peddlers.

Secs. 7211 and 7212, R. S. 1889.

IV.

The machine sold was not an "original package." An "original package," within the meaning of the inter-state commerce clause of the Federal Constitution (§ 8, Art. 1), is an unbroken package imported into a state from another state or foreign country, before it becomes, by sale or otherwise, a part of the general mass of property in the state.

Leisy vs. Hardin, 135 U. S. 100.

License-tax cases, 3 Wall. 462.

Keith vs. State (Ala.), 10 L. R. A. 430.

Tracy vs. State, 3 Mo. 3.

State vs. Shapleigh, 27 Mo. 344.

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